

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 189

MRS. ZILLAH LYON, PETITIONER,

vs.

**MUTUAL BENEFIT HEALTH AND ACCIDENT
ASSOCIATION**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT**

PETITION FOR CERTIORARI FILED JULY 3, 1938.

CERTIORARI GRANTED OCTOBER 10, 1938.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

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MRS. ZILLAH LYON, PETITIONER,

vs.

MUTUAL BENEFIT HEALTH AND ACCIDENT
ASSOCIATION

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

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[fol. a] [Caption omitted]

[fol. 1] Citation, in usual form, showing service on Jno. W. Nance, filed July 12, 1937, omitted in printing.

[fol. 2] [Caption omitted]

IN CIRCUIT COURT OF BENTON COUNTY

MRS. ZILLAH LYON, Plaintiff,

vs.

MUTUAL BENEFIT HEALTH & ACCIDENT ASSN. OF OMAHA,
NEBRASKA, Defendant

COMPLAINT AT LAW—Filed October 31, 1936

Comes now the plaintiff, Zillah Lyon and complains of the defendant herein, and for cause of action alleges and states:

That plaintiff is a resident citizen of the city of Rogers, Benton County, Arkansas, and the widow of William R. Lyon now deceased; that the defendant is a foreign insurance corporation, authorized to do business within the state of Arkansas and to sue and be sued in the courts of said state; that the defendant is engaged in the business of insuring its policy holders against loss of life resulting from accidental causes; with its principal offices and place of business in the City of Omaha, in the State of Nebraska.

[fol. 3] That on the 31st day of December, 1926, the defendant issued and delivered to William R. Lyon, plaintiff's deceased husband, a policy of life and accident insurance, No. 60-J-20343, by the terms of which said defendant, for and in consideration of the sum of \$74.00 premium for the first year, paid in advance, and the sum of \$64.00 annually hereafter, payable in quarterly installments of \$16.00 each, in advance, beginning with the first day of April, 1927, agreed to and did insure the said William R. Lyon in the sum of \$2000.00, against loss of life resulting from accidental causes, and in said policy of insurance the plaintiff is named as beneficiary; a true copy of the material portions of said policy of insurance is hereto attached, marked Exhibit A and pleaded as a part of this complaint.

That on the 19th day of July, 1934, while said policy of insurance was in full force and effect, the said William R.

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Lyon lost his life from accidental causes; that on the 17th day of July, 1934, he was riding on a motor car on the Wichita Falls & Northwestern Railroad, near the city of Breckenridge in the state of Texas, when said motor car accidentally collided with an automobile, as a result of which the said William B. Lyon sustained personal injuries, from the effects of which he died on the said 19th day of July, 1934.

That within the time prescribed by the terms of said policy, the plaintiff furnished to said defendant company notice of the death of the insured, and formal proof of said death, which said notice and proof were accepted by the defendant without exception, but notwithstanding all dues and premiums had been paid on said policy of insurance and that the insured and the plaintiff had fully performed the conditions and requirements of said policy, the defendant has failed and now refuses to pay the sum due plaintiff thereon.

That it is provided in part (C) of said policy of insurance as follows, to-wit:

"After the first year's premium has been paid, each year's renewal of this policy shall add \$200.00 to the death benefit until the same amounts to \$4000.00."

That after the payment of the first year's premium said policy of insurance was renewed each year, beginning with the first day of January, 1928, and including renewals for each year thereafter to and including 1934, making seven annual renewals, which entitles the plaintiff to the sum of \$200.00 for each renewal, in the total sum of \$1400.00, but the plaintiff waives and remits the sum of \$400.00 due her [fol. 4] under this clause in said policy of insurance and claims only the sum of \$1,000.00 under said clause.

That in a rider attached to said policy it is provided as follows:

"In event of the accidental death of the insured under the provisions of this policy, providing this policy has been in force for one year, the company agrees to pay in addition to the amount otherwise payable, an amount equal to all of the premiums paid by the insured on this policy, plus compound interest at the rate of 4% per annum from the date of the payment of each of said premiums to the date of death of the insured", but plaintiff waives her rights under this clause and makes no claim thereunder.

That the plaintiff is entitled to recover of and from the defendant company the total sum of \$2999.68, together with penalty for failure to pay the sum due within the time prescribed by the terms of the policy.

That on the first day of September, 1934, the plaintiff prepared and furnished to the defendant formal proof of the death of the insured, and therefore the sum due the plaintiff on said policy became due and payable on or before the first day of November, 1934, and by reason of the defendant's failure to pay the said sum due within sixty days next after receipt of the proof of death, plaintiff is entitled to recover a penalty thereon in a sum equal to 12% of the sum due her on said policy, in the sum of \$359.88, together with a reasonable attorney's fee to be fixed by the court, which plaintiff alleges to be the sum of \$350.00.

The plaintiff further alleges that in said policy of insurance the following provision appears as provision "C" on the 3rd page of the policy, to-wit:

"The copy of the application indorsed hereon is hereby made a part of this contract and this policy is issued in consideration of the statements made by the insured in the application, and the payment in advance of \$74.00 premium the first year and the payment in advance of premiums of \$64.00 annually or \$16.00 quarterly thereafter, beginning with April first, 1927; is required to keep this policy in continuous effect. If any such dues be unpaid at the office of the association in Omaha, Nebraska, this policy shall terminate on the day such payment is due. The mailing of notice to the insured at least 15 days prior to the date they are due shall constitute legal notice of dues."

[fol. 5] By the terms of provision "C" aforesaid, the defendant company attempted to provide that said premiums must be paid at the home office in Omaha, Nebraska, on the day same became due and payable, but plaintiff alleges that the defendant appointed an agent in the city of Rogers, Arkansas, designated by the defendant as its local treasurer to collect premiums from the insured and other policy holders, with apparent authority to waive the time for payment of premiums and that said local treasurer by long continued practice, without objection upon the part of the defendant company, established the custom of receiving premiums out of time, and it was for a long period of years customary for said local treasurer to receive payment of premiums from

the insured at any time it was most convenient for the insured to make such payments, and the defendant company thereby waived its right to declare a forfeiture of the rights of the insured under said policy, because of failure to pay said premiums at the home office in Omaha, Nebraska, on the day same became due and payable.

That on and prior to the first day of January, 1934, one Roy E. Hamilton was the authorized and acting agent and local treasurer of the defendant company in the City of Rogers, Arkansas, duly authorized to collect premiums from the insured and other policy holders, and had been acting in such capacity for the defendant company for a period of more than five years; that the insured had been accustomed to pay his premiums to said agent during all of said time; that by the terms of said policy of insurance the defendant company was required to give the insured notice of the time said premiums were due and payable; that the defendant company, without any notice to the insured, changed its method of collecting premiums and required same to be paid in the city of Little Rock, Arkansas, and that said premiums be sent by mail to an agent of the defendant company in said city of Little Rock, instead of being paid to said local treasurer; that on the first day of July, 1934, the plaintiff, acting as agent for the insured, attempted to pay said premium to the said local treasurer of the defendant company; that said local treasurer was absent from his office in the city of Rogers, and plaintiff was unable to locate said agent for several days, but finally on the 6th day of July, 1934, plaintiff located said agent and was by him informed that the custom of paying said premiums had been changed and that payment should be made to the defendant's agent in the city of Little Rock, Arkansas; that the plaintiff, acting as agent for the insured, went immediately to the United States Postoffice in said City of Rogers, and purchased a [fol. 6] postal money order for the sum of \$16.00, made payable to the defendant, and deposited same in the postoffice, properly addressed to the defendant, which was in due time received by the defendant; that the defendant refused to accept payment of said premium on the ground that it was not paid on the first day of July, 1934, and the defendant now claims a forfeiture of said policy of insurance on the ground that said premium was not paid on said first day of July. The plaintiff alleges that the defendant was without right

to claim and declare a forfeiture of said policy for the non-payment of said premium on said first day of July for the following reasons, to-wit:

First. That defendant had failed and neglected to give the insured notice of the time said premium was due and payable as required by the terms of said policy.

Second. That the defendant, by its acts and conduct in establishing a custom of receiving payment of premiums out of time and of changing the method of payment from that provided in the policy, had waived its rights to declare a forfeiture for nonpayment of said premium on said first day of July.

Third. That said premium was not due and payable on said first day of July and the insured was not liable for payment of same at said time.

Wherefore, the plaintiff prays that summons issue, commanding the defendant to answer herein and that upon a trial of the issues joined, that plaintiff be awarded judgment against the defendant in the sum of \$2999.68 as the amount of benefits due under the terms of said policy of insurance, and interest thereon, at the rate of 6%, from the first day of November, 1934, to date of judgment herein, together with a penalty thereon in a sum equal to 12% thereof, in the sum of \$359.88; and a reasonable attorney's fee to be fixed by the court in the sum of \$350.00, and plaintiff's costs in this action laid out and expended and all other relief to which the plaintiff may be entitled in the premises.

Zillah Lyon, Plaintiff, by J. W. Nance, Her Attorney.

[File endorsement omitted.]

[fol. 7] (Note by Clerk of Trial Court: Here follows in the Complaint a copy of the policy of insurance. This policy of insurance is set out identically in the Bill of Exceptions, [marginal] page 25 of this transcript, and is therefore not recopied here.)

IN CIRCUIT COURT OF BENTON COUNTY

SUMMONS AND RETURN—Filed Nov. 10, 1936

The State of Arkansas to the Sheriff of Pulaski County,
Greeting:

You Are Hereby Commanded To summon Mutual Benefit Health & Accident Association of Omaha, Nebraska, to answer in twenty days after the service of this summons upon it a complaint filed against it in the Benton County Circuit Court by Mrs. Zillah Lyon and warn it that upon its failure to answer, the complaint will be taken for confessed; and you will make due return of this summons within twenty days after the date of service had.

Witness my hand and the seal of said court this 31st day of October, 1936.

Fred Allred, Clerk. (Seal.)

STATE OF ARKANSAS,

County of Pulaski, ss:

This is to certify that on this 4th day of November, 1936, I have duly served the within writ by delivering a copy and stating the substance thereof to the within named Mutual Benefit Health & Accident Association of Omaha, Nebraska, by delivering a [grue] copy to U. A. Gentry, State Ins. Com. the agent designated for service, in Pulaski County, Arkansas.

L. B. Branch, Sheriff, by W. E. Thackmorton, D. C.

[File endorsement omitted.]

IN CIRCUIT COURT OF BENTON COUNTY

NOTICE OF FILING OF PETITION AND BOND ON REMOVAL

To Mrs. Zillah Lyon, Plaintiff, or her attorney, J. W. Nance:

You are hereby notified that petition and bond for removal to the United States District Court for the Western [fol. 8] District of Arkansas, Fort Smith Division, will be filed in the above court in the above cause on the 20th day of November, 1936.

Mutual Benefit Health & Accident Association, by
Pryor & Pryor, Attorneys,

Copy of the within notice received and service thereof
waived this 20th day of November, 1936.

Mrs. Zillah Lyon.

IN CIRCUIT COURT OF BENTON COUNTY

[Title omitted]

PETITION FOR REMOVAL—Filed November 20, 1936

To the Honorable Circuit Court:

Your petitioner, Mutual Benefit Health and Accident Association, respectfully shows that the matter in dispute in the above entitled and numbered suit exceeds the sum of Three Thousand Dollars, exclusive of interests and costs; that the said suit is purely of a civil nature; that the controversy in said suit is, and at the time of the commencement of this suit was, between citizens of different states, and that your petitioner, the defendant in the above entitled and numbered suit, was at the time of the commencement of this suit, and still is, a resident and citizen of the State of Nebraska, and was at the time of the commencement of this suit, and still is, a corporation duly formed, created, organized, acting and existing under and by virtue of the laws of the state of Nebraska, and was then, and at all times has been, and still is, a citizen and resident of said State of Nebraska; that the plaintiff in said cause was at the commencement of the suit, and at all times since has been, and still is, a resident and citizen of the state of Arkansas, and that the controversy in said suit is now, and at the time of the commencement thereof was, wholly between citizens of different states.

Your petitioner further shows that the time within which it is required, under the laws of the State of Arkansas, and the rules of said court in which said suit is brought, to answer and plead to the petition, declaration or complaint of the plaintiff, has not yet expired, and your petitioner [fols. 9-10] offers herewith bond with good and sufficient surety in the sum of Five Hundred Dollars for its entry in the District Court of the United States for the Western District of Arkansas, Fort Smith Division, within thirty days from the date of the filing of this petition, a copy of the record in this case, and for paying all costs that may be

awarded by said district court if said court shall hold that this suit was wrongfully or improperly removed thereto.

Wherefore, defendant prays this Honorable Court to proceed no further herein except to accept this petition and said bond and to make the order of removal required by law, and to cause the record herein to be removed to said District Court of the United States for the Western District of Arkansas, Fort Smith Division, and in duty bound will it ever thus pray.

Pryor & Pryor, Attorneys of Record for Mutual Benefit Health and Accident Association.

Duly sworn to by T. B. Pryor, Jr. Jurat omitted in printing.

[File endorsement omitted.]

Bond on Removal for \$500.00, approved and filed November 20, 1936, omitted in printing.

[fol. 11] Clerk's certificate to foregoing transcript omitted in printing.

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF
ARKANSAS, FORT SMITH DIVISION

Law. No. 1990

MRS. ZILLAH LYON, Plaintiff,

vs.

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION OF
OMAHA, NEBRASKA, Defendant

ANSWER—Filed December 18, 1936

Comes the defendant, Mutual Benefit Health & Accident Association of Omaha, Nebraska, and for its answer herein states:

That it denies each and every material allegation of the plaintiff's complaint.

Wherefore, having fully answered, defendant prays that it be discharged hence with all of its costs in this behalf laid out and expended.

Pryor & Pryor, Attorneys for Defendant.

[fol. 12] IN UNITED STATES DISTRICT COURT

[Title omitted]

FIRST AMENDED COMPLAINT AT LAW—Filed February 2, 1937

Comes now the plaintiff Zillah Lyon and complains of the defendant herein and for cause of action, alleges and states:

That plaintiff is a resident citizen of the city of Rogers, Benton County, Arkansas, and the widow of William R. Lyon, now deceased; that the defendant is a foreign insurance corporation, authorized to do business within the State of Arkansas, and to sue and be sued in the courts of said state; that the defendant is engaged in the business of insuring its policy holders against loss of life resulting from accidental causes; with its principal office and place of business in the City of Omaha, in the State of Nebraska.

That on the 31st day of December, 1926, the defendant issued and delivered to William R. Lyon, plaintiff's deceased husband, a policy of life and accident insurance, #60J20343, by the terms of which said defendant, for and in consideration of the sum of \$74.00 premium for the first year, paid in advance, and the sum of \$64.00 annually thereafter, payable in quarterly installments of \$16.00 each, in advance, beginning with the first day of April, 1937, agreed to and did insure the said William R. Lyon in the sum of \$2000.00, against loss of life resulting from accidental causes, and in said policy of insurance the plaintiff is named as beneficiary; a true copy of the material portions of said policy of insurance is hereto attached, marked Exhibit A and pleaded as a part of this complaint.

That on the 19th day of July, 1934, while said policy of insurance was in full force and effect, the said William R. Lyon lost his life from accidental causes.

That within the time prescribed by the terms of said policy, the plaintiff furnished to said defendant company notice of the death of the insured, and formal proof of said

death, which said notice and proof were accepted by the defendant without exception, but notwithstanding all dues and premiums had been paid on said policy of insurance and that the insured and the plaintiff had fully performed the conditions and requirements of said policy, and made due demand for payment, the defendant has failed and now refuses to pay the sum due plaintiff thereon.

[fol. 13] That it is provided in part (C) of said policy of insurance as follows, to-wit:

“After the first year's premium has been paid, each year's renewal of this policy shall add \$200.00 to the death benefit until the same amounts to \$4000.00”.

That after the payment of the first year's premium said policy of insurance was renewed each year, beginning with the first day of January, 1928, and including renewals for each year thereafter to and including the year 1933, making six annual renewals, which entitles the plaintiff to the sum of \$200.00 for each renewal, in the total sum of \$1200.00.

That in a rider attached to said policy it is provided as follows:

“In event of the accidental death of the insured under the provisions of this policy, providing this policy has been in force for one year, the company agrees to pay in addition to the amount otherwise payable, an amount equal to all of the premiums paid by the insured on this policy, plus compound interest at the rate of 4% per annum from the date of the payment of each of said premiums to the date of death of the insured.”

That the insured paid all premiums due thereon in the sum of \$464.00, and an additional sum of \$48.00; that under said clause plaintiff is entitled to recover the sum of \$478.00, including interest at the rate of 4% annually.

That the plaintiff is entitled to recover of and from the defendant company benefits in the total sum of \$3678.00.

That on the first day of September, 1934, the plaintiff prepared and furnished to the defendant formal proof of the death of the insured, and therefore the sum due plaintiff on said policy became due and payable on or before the first day of November, 1934, and by reason of the defendant's failure to pay the said sum due within sixty days next after receipt of the proof of death, plaintiff is entitled to

cover a penalty thereon in a sum equal to 12% of the sum due her on said policy, in the sum of \$465.36, together with a reasonable attorney's fee to be fixed by the court, which plaintiff alleges to be the sum of \$350.00.

The plaintiff further alleges that in said policy of insurance the following [provision] appears as provision "C" on the third page of the policy, to-wit:

"The copy of the application indorsed hereon is hereby made a part of this contract and this policy is issued in consideration of the statements made by the insured in the application and the payment in advance of premiums of \$74.00 the first year and the payment in advance of premiums of \$64.00 annually or \$16.00 quarterly thereafter, beginning with April 1st, 1927; is required to keep this policy in continuous effect. If any such dues be unpaid at the office of the association in Omaha, Nebraska, this policy shall terminate on the day such payment is due. The mailing of notice to the insured at least 15 days prior to the date they are due shall constitute legal notice of dues."

By the terms of provision "C" aforesaid, the defendant company attempted to provide that said premiums must be paid at the home office in Omaha, Nebraska on the day same became due and payable, but plaintiff alleges that the defendant appointed an agent in the City of Rogers, Arkansas, designated by the defendant as its local treasurer to collect premiums from the insured and other policy holders, with apparent authority to waive the time for payment of premiums and that said local treasurer by long continued practice, without objection upon the part of the defendant company, established the custom of receiving premiums out of time, and it was for a long period of years customary for said local treasurer to receive payment of premiums from the insured at any time it was most convenient for the insured to make such payments, and the defendant thereby waived its right to declare a forfeiture of the rights of the insured under said policy, because of failure to pay said premiums at the home office in Omaha, Nebraska on the day same became due and payable.

That on and prior to the first day of January, 1934, one E. Hamilton was the authorized and acting agent and local treasurer of the defendant company in the city of Rogers, Arkansas, duly authorized to collect premiums from

the insured and other policy holders, and had been acting in such capacity for the defendant company for a period of more than five years; that the insured had been accustomed to pay his premiums to said agent during all of said time; that by the terms of said policy of insurance the defendant company was required to give the insured notice of the time said premiums were due and payable; that the defendant company, without any notice to the insured, changed its method of collecting premiums and required same to be paid in the city of Little Rock, Arkansas, and that said premiums be sent by mail to an agent of the defendant company in said city of Little Rock, instead of being paid to said local treasurer; that on the first day of [fol. 15] July, 1934, the plaintiff, acting as agent for the insured, attempted to pay said premium to the said local treasurer of the defendant company; that said plaintiff was unable to locate said agent for several days, but finally on the 6th day of July, 1934, plaintiff located said agent and was by him informed that the custom of paying the premiums had been changed and that payment should be made to the defendant's agent in the city of Little Rock, Arkansas; that the plaintiff, acting as agent for the insured, went immediately to the United States Postoffice in said city of Rogers and purchased a postal money order for the sum of \$16.00, made payable to the defendant; and [depos-] same in the postoffice, properly addressed to the defendant, which was in due time received by the defendant; that the defendant refused to accept payment of said premium on the ground that it was not paid on the first day of July, 1934, and the defendant now claims a forfeiture of said policy of insurance on the ground that said premium was not paid on said first day of July. The plaintiff alleges that the defendant was without right to claim and declare a forfeiture of said policy for the non-payment of said premium on said first day of July for the following reasons, to-wit:

First. That defendant had failed and neglected to give the insured notice of the time said premium was due and payable as required by the terms of said policy.

Second. That the defendant, by its acts and conduct in establishing a custom of receiving payment of premiums out of time and of changing the method of payment from that provided in the policy had waived its right to declare

forfeiture for nonpayment of said premium on said first day of July.

Third. That said premium had been previously paid and therefore was not due and payable on said first day of July and the insured was not liable for payment of same at said time.

Wherefore, the plaintiff prays that a summons issue, commanding the defendant to answer herein and that upon a trial of the issues joined, that plaintiff be awarded judgment against the defendant in the sum of \$3678.00, as the amount of benefits due under the terms of said policy of insurance, and interest thereon, at the rate of 6% from the first day of November, 1934, to date of judgment herein, together with a penalty thereon in a sum equal to 12% thereof, in the sum of \$465.36, and a reasonable attorney's fee to be fixed by the court, in the sum of \$350.00, to be [fol 16] charged as costs in this suit, together with all of plaintiff's costs in this action laid out and expended, and all other relief to which the plaintiff may be entitled in the premises.

Zillian Lyon, Plaintiff, by J. W. Nance, Her Attorney.

(Note By Clerk of Trial Court: Here follows in the First Amended Complaint a copy of the policy of insurance. This policy of insurance is set out identically in the Bill of Exceptions, [marginal] page 25 of this transcript, and is therefore not recopied here.)

IN UNITED STATES DISTRICT COURT

DEMURRER TO FIRST AMENDED COMPLAINT—Filed May 27, 1937

Comes the defendant and demurs to the First Amended complaint of the plaintiff and for grounds states:

That said First Amended Complaint does not state facts sufficient to constitute a cause of action against the defendant.

Wherefore, defendant prays that said First Amended complaint of the plaintiff be dismissed and that it be discharged hence with all of its costs.

Pryor & Pryor, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING DEMURRER—Entered June 2, 1937

(Heartsill Ragon, Judge)

This June 2, 1937, comes the plaintiff by John W. Nance, her attorney, and comes the defendant by Brady Pryor, its attorney, and comes on to be heard the demurrer of said defendant to the complaint of the plaintiff in the above entitled cause. The demurrer is argued by counsel and submitted and upon consideration thereof the court doth overrule the same. To which ruling the defendant excepts.

[fol. 17] IN UNITED STATES DISTRICT COURT

ANSWER TO FIRST AMENDED COMPLAINT—Filed June 3, 1937

Comes now the defendant and for its answer to the First Amended Complaint of the plaintiff states:

Admits that plaintiff is a resident citizen of the City of Rogers, Benton County, Arkansas, and the widow of William R. Lyon, now deceased; denies that the defendant is a foreign insurance corporation, but states the facts to be that it is a mutual benefit health and accident association and as such is authorized to do business in the State of Arkansas.

Admits that on the 31st day of December, 1926, the defendant issued and delivered to William R. Lyon, plaintiff's deceased husband, a policy of accident insurance No. 60J-20343, and states the facts to be that said policy was not a life insurance policy within the strict meaning of that term. Defendant admits that by the terms of said policy, for and in consideration of the sum of \$74.00 premium for the first year, paid quarterly in advance, and the sum of \$64.00 annually thereafter, payable in quarterly installments of \$16.00 each, in advance, beginning with the 1st day of April, 1927, it agreed to and did insure the said William R. Lyon in the sum of \$2,000.00 against loss of life resulting from accidental causes and in said policy of insurance the plaintiff was named as beneficiary. Admits that a true copy of said policy is attached to the complaint.

Admits that on the 19th day of July, 1934, the said William R. Lyon, deceased, lost his life from accidental causes,

but denies that said policy of insurance was in full force and effect on that date, and states the facts to be that said policy had expired by its own terms on the 1st day of July, 1934.

Denies that within the time prescribed by the terms of said policy that the plaintiff furnished to the defendant notice of the death of the insured and formal proof of said death, and denies that said notice and proof were accepted by the defendant without exception. Denies that the dues and premiums had been paid on said policy of insurance, and denies that the insured and the plaintiff, or either of them, had fully performed the conditions and requirements [fol. 18] of said policy. Admits that the defendant refuses to pay the plaintiff thereon, and specifically denies that any sum whatever is due plaintiff thereon.

Denies that plaintiff is entitled to recover anything by virtue of part (C) of the policy of insurance. Denies that the plaintiff is entitled to recover any sum whatever by virtue of the rider attached to said policy.

Denies that the insured paid all premiums due thereon in the sum of \$464.00 and an additional sum of \$48.00, and denies that plaintiff is entitled to recover under said clause any sum whatever.

Denies that the plaintiff is entitled to recover of and from the defendant benefits in the total sum of \$3,678.00, or any other sum.

Denies that on the 1st day of September, 1934, that plaintiff prepared and furnished to the defendant formal proof of the death of the insured, and denies that any sum ever became due the plaintiff on or before the 1st day of November, 1934, or at any other time by reason of the death of the insured. Denies that plaintiff is entitled to recover penalty or attorney's fees as prayed for in the complaint.

The defendant admits, as before stated, that a true copy of the insurance policy is attached to the complaint. Admits that by the terms of provision (C) set forth in the complaint that the defendant company attempted and did provide that said premiums must be paid at the home office in Omaha, Nebraska, on the day same became due and payable. Admits that defendant appointed an agent in the City of Rogers, Arkansas, designated by the defendant as its local treasurer, to collect premiums from the assured and other policyholders, but denies that said agent had any authority, either real or apparent, to waive the time for payment of premiums. Denies that said treasurer by long continued

practice without objection on the part of the defendant established the custom of receiving premiums out of time, and denies that it was for a long period of years customary for said local treasurer to receive payment of premiums from the assured at any time that it was most convenient for the assured to make such payments, and denies that the defendant thereby waived its right to declare a forfeiture of the rights of the assured under said policy because of failure [fol. 19] to pay said premiums at the home office in Omaha, Nebraska, on the day same became due and payable.

Defendant states, by way of further answer to that part of the complaint, that the policy sued on herein terminated by its own terms on the 1st day of July, 1934; that it was unnecessary to declare a forfeiture, as the policy had terminated at the expiration of the period for which a premium had been paid in advance.

Admits that on and prior to the 1st day of January, 1934, one Roy E. Hamilton, was authorized to collect premiums for the defendant, but denies that he had any other authority, and specifically denies that he had any authority to waive any of the provisions of the insurance policy, and specifically denies that he had any authority to accept premiums after said premiums became due and payable. Admits that said collecting agent had been acting as such for more than five years prior to January 1, 1934. Defendant specifically states that said Roy E. Hamilton had no further connection with the defendant on and after said 1st day of January, 1934. Admits that the insured had been accustomed to paying his premiums to said agent for a period of time prior to the 1st day of January, 1934. Denies that by the terms of said policy of insurance the defendant was required to give the insured notice of the time the said premiums were due and payable. Denies that the defendant without any notice to the insured changed its method of collecting premiums and required same to be paid in the City of Little Rock, Arkansas, but admits that said premiums were required to be sent by mail to an agent of the defendant company in said City of Little Rock, Arkansas, instead of being paid to said local treasurer. Denies that on the 1st day of July, 1934, or on any other date, the plaintiff, acting as agent for the insured, attempted to pay said premium to the said local treasurer of the defendant company. Denies that said plaintiff was unable to locate said agent for several days, and denies that on the 6th day of July, 1934, or

any other day, plaintiff located said agent, and denies that plaintiff was informed by said agent that the custom of paying the premiums had been changed and that payment should be made to the defendant's agent in the City of Little Rock, Arkansas. Admits that plaintiff went to the United States Postoffice in the City of Rogers, and purchased a postal money order in the sum of \$16.00 payable to the defendant and deposited same in the postoffice properly addressed to the defendant; admits that it was in due time [fol. 20] received by the defendant; admits that the defendant refused to accept payment of said premium, but denies that said refusal to accept was on the ground that the premium was not paid on the 1st day of July, 1934, and denies that the defendant now claims a forfeiture of said policy of insurance on the ground that said premium was not paid on said 1st day of July, but alleges the facts to be that said policy expired by its own terms on the said 1st day of July, 1934, and under the provisions of the insurance contract the defendant was not required to accept renewal premiums. Denies that the defendant was without right to claim and declare a forfeiture of said policy for the nonpayment of said premium on the 1st day of July, 1934, for any reason.

The defendant denies that it failed and neglected to give the insured notice of the time said premium was due and payable by the terms of said policy, and specifically denies that the defendant was required to give any notice.

Denies that the defendant by its acts and conduct established a custom of receiving payments of premiums out of time; denies that it changed the method of payment from that provided in the policy, and denies that it waived its right to declare a forfeiture for the nonpayment of said premium on the 1st day of July, and specifically denies that said premium had been previously paid and, therefore, was not due and payable on said 1st day of July.

Further answering, the defendant states that the policy had expired by its own terms on the 1st day of July, 1934; that the insured died on the 19th day of July, 1934, nineteen days after the expiration of the insurance contract, and plaintiff is not entitled to recover in this action. The policy in part provides (D of additional provisions):

"The term of this policy begins at twelve o'clock noon, standard time, on date of issue against accident . . . and ends at twelve o'clock noon on date renewal is due."

The defendant pleads specifically said provision of the insurance contract as a bar to plaintiff's right of recovery herein.

Further answering, the defendant states that the policy sued on herein provides (C of additional provisions):

" * * The acceptance of any premium on this policy shall be optional with the Association * * * "

[fol. 21] And the defendant specifically pleads said provision of the policy as a bar to the right of the plaintiff to recovery herein.

Defendant alleges and states that under the provisions of the insurance contract that the defendant had the right to refuse to extend for any period of time beyond the period for which the premium had been paid in advance, and that it did refuse to insure the plaintiff for an additional period of time beyond the said 1st day of July, 1934.

Wherefore, having fully answered, defendant prays that the first amended complaint of the plaintiff be dismissed and that it be discharged hence with all of its costs in this behalf laid out and expended.

Pryor & Pryor, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

[Title omitted]

JURY EMPANELED; TRIAL, JUNE 3, 1937—Entered June 3, 1937

(Heartsill Ragon, Judge)

This day comes the plaintiff by John W. Nance, her attorney, and comes the defendant by Brady Pryor and Malcolm W. Gannaway, its attorneys, and the parties announcing ready for trial come the following named persons as jurors for the trial of this cause, to-wit:

Ila Harrison,
G. A. Watts,
J. H. Byers,
R. L. Harper,
L. T. Nolen,
L. P. Stroble,

W. G. O'Neal,
Willis Warren,
L. J. Lee,
E. A. Cowan,
M. V. B. Harris,
Mode Robinson,

twelve good and qualified electors of the Fort Smith Division of the Western District of Arkansas, duly selected, impaneled and sworn. The case being stated by counsel and having heard the evidence adduced, at the hour of adjournment the further consideration thereof is postponed until tomorrow morning, 10 o'clock, and the jury permitted to separate under the admonition of the court until that hour.

IN UNITED STATES DISTRICT COURT

[Title omitted]

TRIAL, JUNE 4, 1937; VERDICT—Entered June 4, 1937

(Heartsill Ragon, Judge)

This day come the parties hereto by their attorneys, and comes the jury heretofore empaneled and sworn herein, as on yesterday, and the trial of this cause proceeds, and the remainder of the evidence is adduced. At the conclusion of all of the evidence, by direction of the court, the jury returned from the box the following verdict, to-wit:

"We, the jury, find for the plaintiff in the sum of \$3678.00.
E. A. Cowan, Foreman."

Whereupon, the jury is discharged from the further consideration of the case.

IN UNITED STATES DISTRICT COURT

(Heartsill Ragon, Judge)

Law. No. 1990

MRS. ZILLAH LYON, Plaintiff,

VS.

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION OF
OMAHA, NEBRASKA, Defendant

JUDGMENT, ORDER DENYING PLAINTIFF'S APPLICATION FOR
ASSESSMENT OF PENALTY, ORDER ALLOWING PLAINTIFF'S
ATTORNEY'S FEE, AND ORDER ALLOWING DEFENDANT NINETY
DAYS IN WHICH TO FILE BILL OF EXCEPTIONS—Entered
June 9, 1937

A verdict for the plaintiff having been duly returned by
the jury in this cause for the sum of \$3678.00 on the 4th day
of June, 1937:

[fol. 23] Now, on motion of John W. Nance, attorney for
the plaintiff, it is by the court considered, ordered and
adjudged that the plaintiff, Mrs. Zillah Lyon have and re-
cover of defendant, Mutual Benefit Health & Accident As-
sociation of Omaha, Nebraska, the sum of \$3678.00, found
by said jury, together with all costs by the plaintiff in this
behalf laid out and expended, and an attorney's fee in the
sum of \$250.00, for which plaintiff may have execution.

To all of which defendant excepts.

Plaintiff also prays judgment for a penalty equal to 12
per cent of the principal amount of said recovery, which
prayer is by the court denied, to which denial plaintiff
excepts.

Thereupon, defendant in open court gives notice of ap-
peal and prays and is by the court allowed ninety days from
this date in which to file its bill of exceptions.

IN UNITED STATES DISTRICT COURT

[Title omitted]

Bill of Exceptions—Filed July 12, 1937

Be It Remembered that on the 3rd day of June, 1937, the above entitled cause came on for hearing before the Honorable Heartsill Ragon, Judge presiding, and both parties announcing ready for trial, a good and lawful jury being impaneled and sworn to try the issues jointly, the following proceedings were had, to-wit:

Appearances:

John W. Nance for plaintiff.

T. B. Pryor, Jr., for defendant.

Thereupon the plaintiff, to maintain the issues on her behalf to be maintained, introduced the following evidence:

MRS. ZILLAH LYON, called as a witness on behalf of plaintiff testified in substance as follows:

[fol. 24] That she is the widow of William R. Lyon, deceased; that Mr. Lyon died on the 19th day of July, 1934, by accidental means (which was admitted by the defendant). It was then admitted that due proof of death was furnished the defendant.

That Mr. Lyon purchased a policy of insurance from the defendant; that the policy was sold by Mr. Cottingham, agent of the Company at Rogers, Arkansas. She was present when the policy was purchased. She identified the policy, and it was introduced in evidence. The policy is in words and figures as follows, to-wit:

(Here follow four photolithographs, side folios, 25, 25a,
26, 26a)

THIS POLICY PROVIDES BENEFITS FOR LOSS OF LIFE, LIMB, SIGHT OR TIME BY ACCIDENTAL MEANS, OR LOSS OF TIME BY SICKNESS AS HEREIN PROVIDED

MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION

OMAHA

Monthly
Benefits

\$100.00

Maximum

Monthly Benefits

\$200.00

Death Benefit
Without Increase

\$2,000

Maximum

Death Benefit

\$4,000

(Herein called Association)
DOES HEREBY INSURE

INSURING
CLAUSE

WILLIAM R. LYON

(Herein called the Insured)

of City of ROGERS

State of

ARKANSAS.

against loss of life, limb, sight, or time, resulting directly and independently of all other causes, from bodily injuries sustained through purely Accidental Means (Suicide, sane or insane, is not covered), and against loss of time on account of disease contracted during the term of this Policy, respectively, subject, however, to all the provisions and limitations hereinafter contained.

Accident Indemnities

PART A.

SPECIFIC LOSSES

If the Insured shall, through accidental means, sustain bodily injuries as described in the Insuring Clause, which shall, independently and exclusively of disease and all other causes, immediately, continuously and wholly disable the Insured from the date of the accident and result in any of the following specific losses within thirteen weeks, the Association will pay:

For Loss of Life _____ \$2,000.00
For Loss of Both Eyes _____ 2,000.00
For Loss of Both Hands _____ 2,000.00
For Loss of Both Feet _____ 2,000.00

For Loss of One Hand and One Foot _____ \$2,000.00
For Loss of Either Hand _____ 750.00
For Loss of Either Foot _____ 750.00
For Loss of Either Eye _____ 500.00

Loss in every case referred to in the above schedule for dismemberment of hands and feet shall mean severance at or above the wrist or above the ankle joint, respectively, and the loss of eye or eyes shall mean the total and irrecoverable loss of entire sight thereof. Only one of the amounts named in this part will be paid for injuries resulting from one accident, and shall be in lieu of all other indemnity.

PART B.

DOUBLE REGULAR DEATH BENEFIT

If the Insured sustains injuries as described in the Insuring Clause, while riding as a passenger, within a public conveyance, provided by a common carrier for passenger service only, propelled by steam or electricity, caused by the wrecking of the conveyance, and such injuries independently and exclusively of disease and all other causes shall continuously and wholly disable the Insured from the date of the accident and result in the death of the Insured within thirteen weeks from the date of the accident, the Association will pay in lieu of all other indemnity:

For Loss of Life _____

\$4,000.00

MINNEAPOLIS HARD ACCIDENT ASSOCIATION

Monthly
Benefits

\$100.00

Maximum
Monthly Benefits

\$200.00

CHARTER

(Herein called Association)
DOES HEREBY INSURE

Death Benefit
Without Increase

\$2,000

Maximum
Death Benefit

\$4,000

INSURING
CLAUSE

WILLIAM R. LYON

(Herein called the Insured)

of City of ROGERS

State of

ARKANSAS.

against loss of life, limb, sight, or time, resulting directly and independently of all other causes, from bodily injuries sustained through purely Accidental Means (Suicide, cause or issue, is not covered), and against loss of time on account of disease contracted during the term of this Policy, respectively, subject, however, to all the provisions and limitations hereinafter contained.

Accident Indemnities

PART A.

SPECIFIC LOSSES

If the Insured shall, through accidental means, sustain bodily injuries as described in the Insuring Clause, which shall, independently and exclusively of disease and all other causes, immediately, continuously and wholly disable the Insured from the date of the accident and result in any of the following specific losses within thirteen weeks, the Association will pay:

For Loss of Life. \$2,000.00
For Loss of Both Eyes. 2,000.00
For Loss of Both Hands. 2,000.00
For Loss of Both Feet. 2,000.00

For Loss of One Hand and One Foot. \$2,000.00
For Loss of Either Hand. 750.00
For Loss of Either Foot. 750.00
For Loss of Either Eye. 500.00

Loss in every case referred to in the above schedule for dismemberment of hands and feet shall mean severance at or above the wrist or above the ankle joint, respectively, and the loss of eye or eyes shall mean the total and irreparable loss of entire sight thereof. Only one of the amounts named in this part will be paid for injuries resulting from one accident, and shall be in lieu of all other indemnity.

PART B.

DOUBLE REGULAR DEATH BENEFIT

If the Insured sustains injuries as described in the Insuring Clause, while riding as a passenger, within a public conveyance, provided by a common carrier for passenger service only, propelled by steam or electricity, caused by the wrecking of the conveyance, and such injuries independently and exclusively of disease and all other causes shall continuously and wholly disable the Insured from the date of the accident and result in the death of the Insured within thirteen weeks from the date of the accident, the Association will pay in lieu of all other indemnity:

For Loss of Life. \$4,000.00

PART C. ANNUAL INCREASE TWO HUNDRED DOLLARS PER YEAR

After the first year's premium has been paid each year's renewal of this policy shall add Two Hundred Dollars to the death benefit until the same amounts to Four Thousand (\$4,000.00) Dollars.

\$4,000.00 TWENTY YEAR PRIVILEGE

When twenty full annual premiums have been paid, the death benefit of \$4,000.00, as herein provided, may be continued in force thereafter at a yearly cost of \$4.00 without a medical examination.

WAIVER OF PREMIUM

In case of permanent total disability of the Insured, due to accidental injury or sickness, there will be no further premiums payable on this policy, but the Insured will continue to draw full benefits as provided in the policy.

Date 1914

PART D. TOTAL ACCIDENT DISABILITY ONE HUNDRED DOLLARS PER MONTH FOR LIFE

If such injuries as described in the Insuring Clause, shall wholly and continuously disable the Insured for one day or more, and so long as the Insured lives and suffers said total loss of time, the Association will pay a monthly indemnity at the rate of One Hundred (\$100.00) Dollars.

PART E. PARTIAL ACCIDENT DISABILITY FORTY DOLLARS PER MONTH

If such injuries, as described in the Insuring Clause, shall wholly and continuously disable the Insured from performing one or more important duties, or for like continuous disability following total loss of time, the Association will pay for the period of such partial loss of time, but not exceeding three consecutive months, a monthly indemnity of Forty (\$40.00) Dollars.

PART F. DOUBLE INDEMNITY TWO HUNDRED DOLLARS PER MONTH FOR LIFE

If the Insured sustains injuries while riding as a passenger, within a public conveyance, provided by a common carrier for passenger service only, propelled by steam or electricity, caused by the wrecking of the conveyance, the Association will pay double the amount of monthly indemnity the Insured would otherwise receive.

PART G. MEDICAL ATTENDANCE TWENTY-FOUR DOLLARS

If such injuries require immediate medical or surgical treatment by a physician, surgeon or osteopath, and Insured makes no other claim on account of such injuries, the Association will reimburse the Insured for the cost thereof, not exceeding Twenty-Four (\$24.00) Dollars.

PART H. FINANCIAL AID TWO HUNDRED DOLLARS

If such injuries render the Insured physically unable to communicate with friends, the Association will upon receipt of a message giving this Policy number, immediately transmit to the relatives or friends of the Insured any information respecting him, and will defray all expenses necessary to put the Insured in communication with, and in the care of friends, provided such expense shall not exceed the sum of Two Hundred (\$200.00) Dollars. This benefit to be in addition to any other benefits.

Illness Indemnities

PART I. CONFINING ILLNESS ONE HUNDRED DOLLARS PER MONTH FOR LIFE

The Association will pay, for one day or more, at the rate of One Hundred (\$100.00) Dollars per month for disability resulting from disease, the cause of which originates more than thirty days after the date of this Policy, and which confines the Insured continuously within doors and requires regular visits therein by legally qualified physician; provided said disease necessitates total disability and total loss of time.

PART J. NON-CONFINING ILLNESS FIFTY DOLLARS PER MONTH

The Association will pay, for one day or more, at the rate of Fifty (\$50.00) Dollars per month, but not exceeding one month for disability resulting from disease, the cause of which originates more than thirty days after the date of this policy, and which does not confine the Insured continuously within doors but requires regular medical attention; provided said disease necessitates total disability and total loss of time.

PART K. TWO HUNDRED DOLLARS PER MONTH WHILE IN HOSPITAL

If the Insured on account of any accidental injury or disease covered by this policy shall enter a hospital and be necessarily and continuously confined therein solely on account of said injury or disease, the Association will reimburse him for his actual hospital expense, but not exceeding One Hundred (\$100.00) Dollars per month or a proportionate amount for any fractional part of a month. This benefit is in addition to any other monthly benefits and shall be payable for a period not exceeding three months.

Standard Provisions

1. This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance. No reduction shall be made in any indemnity herein provided by reason of change in the occupation of the Insured or by reason of his doing any act or thing pertaining to any other occupation.

2. No statement made by the applicant for insurance not included herein shall void the policy or be used in any legal proceeding hereunder. No agent has authority to change this policy or to waive any of its provisions. No change in this policy shall be valid, unless approved by an executive officer of the Association and such approval be endorsed hereon.

3. If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of the premium by the Association or any of its duly authorized agents shall reinstate the policy, but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance.

4. Written notice of injury or of sickness on which claim may be based must be given to the Association within twenty days after the date of the accident causing such injury or within ten days after the commencement of disability from such sickness. In the event of accidental death immediate notice thereof must be given to the Association.

5. Such notice given by or in behalf of the Insured or beneficiary, as the case may be, to the Association at Omaha, Nebraska, or to any authorized agent of the Association, with particulars sufficient to identify the Insured, shall be deemed to be notice to the Association. Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible.

6. The Association upon receipt of such notice, will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not so furnished within fifteen days after the receipt of such notice, the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss upon submitting within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, character and extent of the loss for which claim is made.

7. Affirmative proof of loss must be furnished to the Association at its said office in case of claim for loss of time from disability within ninety days after the termination of the period for which the Association is liable, and in case of claim for any other loss within ninety days after the date of such loss.

8. The Association shall have the right and opportunity to examine the person of the Insured when and so often as it may reasonably require during the pendency of claim hereunder, and also the right and opportunity to make an autopsy in case of death where it is not forbidden by law.

9. All indemnities provided in this policy for loss other than that of time on account of disability will be paid within sixty

PART H.**FINANCIAL AID TWO HUNDRED DOLLARS**

If such injuries render the insured physically unable to communicate with friends, the Association will upon receipt of a message giving this Policy number, immediately transmit to the relatives or friends of the insured any information respecting him, and will defray all expenses necessary to put the insured in communication with, and in the care of friends, provided such expense shall not exceed the sum of Two Hundred (\$200.00) Dollars. This benefit to be in addition to any other benefits.

Illness Indemnities**PART I.****CONFIRMING ILLNESS ONE HUNDRED DOLLARS PER MONTH FOR LIFE**

The Association will pay, for one day or more, at the rate of One Hundred (\$100.00) Dollars per month for disability resulting from disease, the cause of which originates more than thirty days after the date of this Policy, and which confines the insured continuously within doors and requires regular visits therein by legally qualified physicians; provided said disease necessitates total disability and total loss of time.

PART J.**NON-CONFIRMING ILLNESS FIFTY DOLLARS PER MONTH**

The Association will pay, for one day or more, at the rate of Fifty (\$50.00) Dollars per month, but not exceeding one month for disability resulting from disease, the cause of which originates more than thirty days after the date of this policy, and which does not confine the insured continuously within doors but requires regular medical attention; provided said disease necessitates total disability and total loss of time.

PART K.**TWO HUNDRED DOLLARS PER MONTH WHILE IN HOSPITAL**

If the insured on account of any accidental injury or disease covered by this policy shall enter a hospital and be necessarily and continuously confined therein solely on account of said injury or disease, the Association will reimburse him for his actual hospital expenses, but not exceeding One Hundred (\$100.00) Dollars per month or a proportionate amount for any fractional part of a month. This benefit is in addition to any other monthly benefits and shall be payable for a period not exceeding three months.

Standard Provisions

1. This policy includes the endorsements and attached pages, if any, and contains the entire contract of insurance. No request shall be made in any indemnity herein provided by reason of change in the occupation of the insured or by reason of his doing any act or thing pertaining to any other occupation.
2. No statement made by the applicant for insurance not included herein shall void the policy or be used in any legal proceeding hereunder. No agent has authority to change this policy or to waive any of its provisions. No change in this policy shall be valid, unless approved by an executive officer of the Association and such approval be endorsed hereon.
3. If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of the premium by the Association or any of its duly authorized agents shall reinstate the policy, but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance.
4. Written notice of injury or of sickness on which claim may be based must be given to the Association within twenty days after the date of the accident causing such injury or within ten days after the commencement of disability from such sickness. In the event of accidental death immediate notice thereof must be given to the Association.
5. Such notice given by or in behalf of the insured or beneficiary, as the case may be, to the Association at Omaha, Nebraska, or to any authorized agent of the Association, with particulars sufficient to identify the insured, shall be deemed to be notice to the Association. Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible.
6. The Association upon receipt of such notice, will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not so furnished within fifteen days after the receipt of such notice, the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss upon submitting within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, character and extent of the loss for which claim is made.
7. Affirmative proof of loss must be furnished to the Association at its said office in case of claim for loss of time from disability within ninety days after the termination of the period for which the Association is liable, and in case of claim for any other loss within ninety days after the date of such loss.
8. The Association shall have the right and opportunity to examine the person of the insured when and so often as it may reasonably require during the pendency of claim hereunder, and also the right and opportunity to make an autopsy in case of death where it is not forbidden by law.
9. All indemnities provided in this policy for loss other than that of time on account of disability will be paid within sixty days after receipt of due proof.
10. Upon request of the insured and subject to due proof of loss all of the accrued indemnity for loss of time on account of disability will be paid at the expiration of each month during the continuance of the period for which the Association is liable and any balance remaining unpaid at the termination of such period will be paid immediately upon receipt of due proof.
11. Indemnity for loss of life of the insured is payable to the beneficiary if surviving the insured, and otherwise to the estate of the insured. All other indemnities of this policy are payable to the insured.
12. If the insured shall at any time change his occupation to one classified by the Association as less hazardous than that stated in the policy, the Association, upon written request of the insured and surrender of the policy, will cancel the same and will return to the insured the unearned premium.
13. Consent of the beneficiary shall not be requisite to surrender or assignment of this policy, or to change of beneficiary, or to any other changes in the policy.
14. No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this policy, nor shall such action be brought at all unless brought within two years from the expiration of the time within which proof of loss is required by the policy.

15. If any time limitation of this policy with respect to giving notice of claim or furnishing proof of loss is less than that permitted by the law of the state in which the insured resides at the time this policy is issued, such limitation is hereby extended to agree with the minimum period permitted by such law.

Additional Provisions

(a) This policy does not cover death, disability, or other loss sustained in any part of the world except the United States and Canada, or while engaged in military or naval service, or while the insured is not continuously under the professional care and regular attendance, at least once a week, beginning with the first treatment, of a licensed physician or surgeon, other than himself; or received because of or while participating in aerobatics; or resulting from insanity; or disability from any disease of organs which are not common to both sexes.

(b) Strict compliance on the part of the insured and beneficiary with all the provisions and agreements of this policy, and the application signed by the insured, is a condition precedent to recovery, and any failure in this respect shall forfeit to the Association all right to any indemnity.

(c) The copy of the application indorsed hereon is hereby made a part of this contract and this policy is issued in consideration of the statements made by the insured in the application and the payment in advance of ~~premium~~ (\$7.00) Dollars the first year, and the payment in advance of premiums of ~~premium~~ (\$7.00) Dollars annually or ~~premium~~ (\$1.75) Dollars quarterly thereafter, beginning with April 1st, 1927. is required to keep this policy in continuous effect. If any such dues be unpaid at the office of the Association in Omaha, Nebraska, this policy shall terminate on the day such payment is due. The mailing of notice to the insured at least fifteen days prior to the date they are due shall constitute legal notice of dues.

The acceptance of any premium on this policy shall be optional with the Association, and should the premium provided for herein be insufficient to meet the requirements of this policy, the Association may call for the difference as required.

(d) The term of this policy begins at 12 o'clock noon, Standard Time, on date of issue against accident and on the thirty-first day after date of issue against disease and ends at 12 o'clock noon on date any renewal is due.

(e) No provision of the charter or by-laws of the Association not included herein shall avoid the policy or be used in any legal proceeding hereunder.

(f) The Annual Meeting of the Association will be held at ten o'clock A. M. on the second Saturday after the first day of February, at the Home Office of the Association.

IN WITNESS WHEREOF, MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION has caused this policy to be signed by its President and its Treasurer, and dated this 31st day of December 1926, but the same shall not be binding upon the Association until countersigned by its duly authorized Policy Clerk.

Countersigned by

A. P. Arin
Treasurer.

A. Miller
President.

O. C. Balis
Policy Clerk.

COPY OF APPLICATION

1. What is your full name? William P. Lyon.
2. What is your age? 54 Date of birth? March J, 1872
Place of birth? Ky. (State)
Height? 5 feet 8 inches Weight? 170 Pounds
3. What is your residence address? R. F. D. 2, Box 6. Street
Town of Rogers State of Ark.
4. Whom do you name as beneficiary? Name Mrs. Zillian Lyon.
Address Same.
What is the relationship of the beneficiary to you? wife.
5. Are you member of firm or employee? Yes Name of firm? W. F. & S. R. R.
Nature of business? Railroads.
Location of firm? Wichita Falls. Street
Town of _____ State of Tex.
6. What is your occupation? Bridge and Building Foreman.

beginning with APRIL 1, 1926, is required to keep this policy in continuous effect. If any such dues be unpaid at the office of the Association in Omaha, Nebraska, this policy shall terminate on the day such payment is due. The mailing of notice to the insured at least fifteen days prior to the date they are due shall constitute legal notice of dues.

The acceptance of any premium on this policy shall be optional with the Association, and should the premium provided for herein be insufficient to meet the requirements of this policy, the Association may call for the difference as required.

(d) The term of this policy begins at 12 o'clock noon, Standard Time, on date of issue against accident and on the thirty-first day after date of issue against disease and ends at 12 o'clock noon on date any renewal is due.

(e) No provision of the charter or by-laws of the Association not included herein shall avoid the policy or be used in any legal proceeding hereunder.

(f) The Annual Meeting of the Association will be held at ten o'clock A.M. on the second Saturday after the first day of February, at the Home Office of the Association.

IN WITNESS WHEREOF, MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION has caused this policy to be signed by its President and its Treasurer, and dated this 31st day of December, 1926, but the same shall not be binding upon the Association until countersigned by its duly authorized Policy Clerk.

A. A. Davis
Treasurer.

William P. Lyon
President.

Countersigned by

E. C. Balis
Policy Clerk.

COPY OF APPLICATION

1. What is your full name? William P. Lyon,
2. What is your age? 54 Date of birth? March 3, 1872
Place of birth? Ky. (State)
Height? 5 feet 8 inches. Weight? 170 Pounds
3. What is your residence address? R. F. D. #2, Box 6, Street
Town of Rogers State of Ark.
4. Whom do you name as beneficiary? { Name Mrs. Zillian Lyon,
Address Same.
What is the relationship of the beneficiary to you? wife.
5. Are you member of firm or employee? Yes Name of firm? W. F. & S. R. R.
Nature of business? Railroads.
Location of firm? Wichita Falls. Street
Town of Wichita Falls State of Tex.
6. What is your occupation? Bridge and Building Foreman.
7. What are all of your duties connected therewith? Supervising only.
8. What accident or health insurance do you carry? Give names of all companies or associations and amounts none

Have you any application for life, accident or health insurance pending? Answer as to each no

9. Has any application ever made by you for life, accident or health insurance been declined? Answer as to each no
 Has any life, health or accident policy issued to you been cancelled? Answer as to each no
 Has any renewal of a life, accident or health policy been refused by any company or association? Answer as to each no
 If so, give full particulars no

10. Have you ever made claim for or received indemnity on account of any injury or illness? If so, give companies or associations, dates, amounts and causes no

11. Are you sound physically and mentally? Answer as to each YES. Are you maimed or deformed? Answer as to each no
 Have you any impairment of sight or hearing? Answer as to each no. Have you ever had a hernia? no
 Are your habits correct and temperate? yes

12. Have you ever had any of the following diseases: Rheumatism? no Tuberculosis? no Epilepsy? no
 Diabetes? no Heart Disease? no Any disease of the brain or nervous system? no

13. Have you received medical or surgical advice or treatment or had any local or constitutional disease within the past five years? Answer as to each no
 In no for no lasting no
 (Year) (Nature of Disease) (State Duration)
 In no for no lasting no

14. Have you ever been operated on by a physician or surgeon? no Date no
 For no Result no

15. Do your average weekly earnings equal or exceed the weekly indemnity payable under the policy now applied for and under all other accident and health policies now carried by you? yes

16. What is the form number of policy applied for? 60J What is the premium? \$ 16.00 quarterly

17. Do you agree that this application shall not be binding upon the Association until accepted by the Association, nor until the policy is accepted by the insured while in good health? yes

18. Do you hereby apply to the MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION for a policy to be based upon the foregoing statements of facts, and do you understand and agree that the falsity of any statement in this application shall bar the right to recover if such false statement is made with intent to deceive or materially affects either the acceptance of the risk or the hazard assumed by the Association? yes

Dated at Rogers Ark. this 27 day of December 1926.
 (Signature of applicant) William R. Lyon

Policy Form **60J**

DECEMBER 31, 1926.

DATED

WILLIAM R. LYON

ISSUED TO



IN THE

NO 60J-20343



SOUTHERN DIVISION OFFICE
 87-215 FALLS BUILDING
 MEMPHIS, TENN.

THIS POLICY PROVIDES
 BENEFITS FOR
 LOSS OF LIFE, LIMB, SIGHT OR
 TIME BY ACCIDENTAL MEANS,
 OR LOSS OF TIME BY
 SICKNESS AS HEREIN
 PROVIDED

Pd 2/1

14. Have you ever been operated on by a physician or surgeon? no Date
 For Result

15. Do your average weekly earnings equal or exceed the weekly indemnity payable under the policy now applied for and under all other accident and health policies now carried by you? YES

16. What is the form number of policy applied for? 60J ^{KORP 1} What is the premium? \$ 16.00 quarterly

17. Do you agree that this application shall not be binding upon the Association until accepted by the Association, nor until the policy is accepted by the Insured while in good health? YES

18. Do you hereby apply to the **MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION** for a policy to be based upon the foregoing statements of facts, and do you understand and agree that the falsity of any statement in this application shall bar the right to recover if such false statement is made with intent to deceive or materially affects either the acceptance of the risk or the hazard assumed by the Association? yes

Dated at Bagara Ark. this 27 day of December 1926.
 (Signature of applicant) William R. Lyon

P48 1

**THIS POLICY PROVIDES
 BENEFITS FOR
 LOSS OF LIFE, LIMB, SIGHT OR
 TIME BY ACCIDENTAL MEANS,
 OR LOSS OF TIME BY
 SICKNESS AS HEREIN
 PROVIDED**

FROM
**SOUTHERN DIVISION OFFICE
 67 ONE FALLS BUILDING
 MEMPHIS, - - - TENN.**

NO 60J-20343

IN THE

ISSUED TO

WILLIAM R. LYON

DATED

DECEMBER 31, 1926.

Policy Form 60J

**\$200,000.00
 DEPOSITED WITH
 THE STATE OF
 NEBRASKA AS
 A PROTECTION
 TO ALL
 POLICYHOLDERS**

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION

[fol. 27] That Mr. Lyon and herself paid the agent \$74.00 in cash when the policy was taken out; that the next premium was paid on the 1st of March; that she paid a year in advance. The policy was taken out on December 31, 1936.

Plaintiff then identified a receipt from the Company, which is in words and figures as follows, to-wit:

PLAINTIFF'S EXHIBIT No. 2

"Official Receipt for Dues

Rogers
Mar. 26
12 M
1927
Ark.

60J-20343

R-I

16.00

Mr. William R. Lyon,
R. F. D. 2, Box 6,
Rogers, Ark."

(Reverse side of Receipt)

"Mutual Benefit Health and Accident Association,
Omaha, 2nd Floor Baird Bldg.

(Thanks.)

This is an acknowledgment to the member to whom this card is addressed. File this receipt with your policy for future reference. Your address upon our records is the same as indicated upon the opposite side of this card. If you change your address or occupation notify the Association.

"The Mutual Benefit Health and Accident Ass'n in consideration of the payment of premium due, and subject to the provisions of policy held by Insured and the statements and answers in the application signed by the Insured, which the Insured by the acceptance of this receipt repeats and declares to be true and agrees shall be the basis of his contract of insurance, does hereby continue in force the said policy from date hereof until twelve

o'clock, noon, standard time, July 1, 1927, at which time the next quarterly payment will be due.

Yours truly,

Countersigned this 25 day of March, 1927.

By J. T. Cottingham, Local Treasurer.

C. C. Criss, Treasurer."

[fol. 28] That she continued to pay quarterly premiums upon the policy, and never missed a payment; that the Company never objected to her paying the premium to Mr. Cottingham; that Mr. Cottingham was the local agent, but is dead. He lived at Rogers. Afterwards she made payments to Mr. Hamilton, agent at Rogers, and never did make a payment at Omaha, Nebraska. The Company never made any objection to her paying the premium to Mr. Hamilton. That she never had any trouble about the payment of quarterly premiums until the one she sent in July. She had an arrangement with Mr. Hamilton whereby she would always go down to his office and give him the money, and he would write out the receipt there, but oftentimes he would not be there, and she couldn't find him, and she would go to his house and hunt him up. Several times she was delayed in finding him. She would complain to Mr. Hamilton about him being out of his office when she would go down to pay him and that he said:

"Now, Mrs. Lyons, don't you worry about that. Anybody that I know is good for these payments, I make out the receipt on the first of the month, anyway, and then when you are down town sometime, and I am in the office or it is convenient, you can step in and pay me."

That she made them that way, paid them just any place she could catch him and at any time that it was convenient. That she received the money from her husband with which to pay the premium. That most of the time it would be the first of the month when the money would come and that she would always take it and pay Mr. Hamilton. That she was delayed, and in answer to the question, "The question is, were you delayed and made your payment after the first of the month?" she answered, "Yes, sir, several times."

"Mr. Pryor: We object to that testimony.

"The Court: Objection overruled. You may have your exception.

"Mr. Pryor: Note my exception."

(It was admitted that Mr. Hamilton was the local treasurer.)

That the Company never objected to her making payments to Mr. Hamilton. She identified — and the following receipts were introduced in evidence, all of which were identical with or similar to the receipt heretofore introduced, with the exception of the date that it was countersigned and the date to which said premium carried the policy in force.

[fol. 29] **PLAINTIFF'S EXHIBIT No. 3**

A receipt not postmarked, provided:

"Does hereby continue in force the said policy from date hereof until twelve o'clock, noon, standard time, April 1, 1928, at which time the next quarterly payment will be due."

Countersigned the 3rd day of January, 1928.

By Roy E. Hamilton, Local Treasurer.

Witness stated that the next receipt was for the first premium that she sent to Little Rock. Plaintiff's Exhibit No. 4, postmarked Little Rock, March 30, 9:30 P. M., 1934, Ark., reads in part:

PLAINTIFF'S EXHIBIT 4

"Official receipt for premium due April 1, 1934 * * * Payment of this premium receipted for, if made on or before the date to which premiums have already been paid, keeps your policy in continuous effect, and if made after that date reinstates the policy from date of this receipt, as provided in policy, until twelve o'clock, noon, standard time, July 1, 1934, at which time another premium will be due."

Countersigned March 30, 1934.

By Harold R. Parker, Local Treasurer.

That she sent this premium to Little Rock after she had gone down to Mr. Hamilton's office to make her payment and he wasn't in his office. He was out at the [single] mill at Pea Ridge, and there was a girl in the office. She presumed the girl was about fourteen or fifteen years old. She told the girl that she wanted to pay the insurance premium and that the girl told her, "You will have to send that to Little Rock." That the girl got a little piece of paper and wrote down the address at Little Rock. That she bought a money order, addressed the envelope to Harold Parker, Little Rock, and mailed it, and the girl didn't say one word about Mr. Hamilton being discharged or why it was necessary for her to send the payment to Little Rock. She just took it for granted that Mr. Hamilton was out of town and that the girl was not allowed to give a receipt. That she received no notice that the Company had changed its method of collecting premiums. [fol. 30] That the circumstances surrounding the next "quarterly payment" were as follows: That she went down the first of July to make the next payment, and there was nobody in Hamilton's office, it was closed up. That she looked around a day or two and couldn't find Mr. Hamilton, and went down to his house where he used to live, and he had moved. That she could not find out where he was for a day or two, and finally located him, and went over to his house the second time before she caught him at home. That it was two or three or four days late then. The next morning she went down to his office early, about seven o'clock, and he was just getting in his car in front of his office, and she called to him to wait, that she wanted him to take her insurance money and that he said, "I can't take that, I can't take that," and she said, "Well, why can't you take it?" and he said, "Well, you will have to send that to Little Rock." That he didn't tell her where to send it in Little Rock, but asked her, "Didn't you get a notice from the Company?" and she said, "No, I haven't had any notice from the Company," and he said, "Well, they should have sent you one." That she went back home, and waited for the mail carrier that morning and thought perhaps she would get the notice, but didn't, so that afternoon she went down to the post office and addressed the envelope just to the Company at Little Rock, and bought a money order, and sent it. That the day after she mailed the money order she drove over to Oklahoma City, and was

gone from home two or three days, and when she got back home a letter was there, and they had sent the money order back. She identified the money order, and it was introduced in evidence.

Plaintiff's Exhibit No. 5 was a United States postal money order for \$16.00, dated July 6, 1934, the face of which reads as follows:

PLAINTIFF'S EXHIBIT 5

| | | |
|----------------------------------|--------------|---------------|
| "74300 | Rogers, Ark. | 294252 |
| Office Number | | Serial number |
| United States Postal Money Order | | Dollars # |
| Identification required | | 16 |
| | | cents |

July - 6 - 34

Postmaster at

Little Rock, Ark.

Postal
Money
Order

Pay amount stated above to order of payee named in attached coupon. Not good for more than largest amount [fol. 31] indicated on left hand margin. Any alteration or erasure renders this order void.

Paying office

L. Loyd Patterson, Postmaster.

Received Payment:

Stamp here

Rogers, Ark.

74300
Office Number

294252
Serial Number

Coupon for Paying Office
Holder Must Not Detach

| | | | |
|-------------------------|---------|-------------------|-------|
| Sixteen | Dollars | # | Cents |
| Write Words for Dollars | | Figures for Cents | |

Pay To:

Mutual Benefit

Remitter:

Health & Accident Association
William R. Lyon

Issuing Office

Rogers, Ark.

C. O. D. Jul. 6
Parcel Number 1934"

Stamp Here

The letter returning the money order is as follows:

PLAINTIFF'S EXHIBIT NUMBER 6

"C. C. Criss, President-Treasurer. F. W. Engler, Vice-President.

Mutual Benefit Health and Accident Association,
Omaha

July 13, 1934.

"Mr. William B. Lyon, R. F. D. 2, Box 9, Rogers, Arkansas.

"DEAR MR. LYON:

You will find inclosed the money order in the amount of \$16.00, which you sent us to reinstate your policy #60J-20343, and we regret that it will not be possible for [fol. 32] us to accept this payment, as the Home Office did not send us an official receipt for you.

We note that you are past the age of sixty years, but we are today writing our Home Office, and asking if it will be possible to make an exception in your case, and allow you to continue keeping your policy in force with the Thirty Day Elimination Endorsement attached. Kindly advise if you would desire to keep your policy in force if our Home Office will attach a Thirty Day Elimination Endorsement. This endorsement will mean that you will not be paid any benefits during the first thirty days of any period of disability, but should you be disabled over a long period of time, you would have the same protection as you previously had, starting on the 31st day.

Just as soon as we receive a reply from our Home Office, we will write you, and we are enclosing a self-addressed envelope for your convenience in advising us if you would desire to keep your policy in force with the endorsement attached.

Very truly yours, Mutual Benefit Health and Accident Ass'n, Harold B. Parker, General Manager."

HRP/ch.

That she received another letter concerning this, which was introduced in evidence.

PLAINTIFF'S EXHIBIT NUMBER 7

"C. C. Crise, President-Treasurer. F. W. Engler, Vice-President.

**Mutual Benefit Health and Accident Association,
Omaha**

July 26, 1934.

**"Mr. William R. Lyon, R. F. D. #2, Box 9, Rogers,
Arkansas.**

DEAR MR. LYON:

We have just received a letter from our Home Office in which they state that they will make an exception in your [fol. 33] case and if you will accept a thirty-day elimination on your policy and remove the non-confining rider No. 1, that they will allow you to reinstate your policy.

The thirty day elimination endorsement will mean that you will not be entitled to any benefits during the first thirty days of any period of disability due to sickness or accident, and your benefits will start on the thirty-first day, although your policy will allow you same lifetime coverage as heretofore, and there will be no increase in the premium rates.

This is certainly an unusual exception on the part of our Home Office and if you desire to accept same, kindly sign both copies of the enclosed thirty day elimination endorsement and return the original signed endorsement to us together with the non-confining rider No. 1 which is attached to your policy and your check for a regular quarterly premium.

You will find the endorsement is pasted in your policy and this is the rider you should tear out and send to us or if you do not understand what we mean, you can send us both signed copies of the endorsement which we are enclosing together with your policy, and your quarterly premium, waiting your reply.

**Very truly yours, Mutual Benefit Health & Accident
Ass'n, Harold R. Parker, General Manager"**

"Endorsement

"To become attached to and form a part of Policy No. 60J-29343.

It is understood and agreed that no monthly indemnity shall be payable for the first 30 days of any period of disability caused by either sickness or accident, covered by the above policy.

Any provision in said policy inconsistent with this agreement is hereby modified to agree therewith. Otherwise said policy to remain as originally written.

I fully understand and agree to the foregoing.

(Sign Here) — — —, Insured Policy Holder.

Witness: — — —.

Mutual Benefit Health & Accident Association.

[fol. 34] Dated, approved and countersigned at Little Rock, this 26 day of July, 1934.

By — — —, Policy Clerk.

That she had never received any previous notice of any change of the Company's place of handling business. Plaintiff then identified and it was admitted in evidence a letter (Plaintiff's Exhibit No. 8) from C. C. Criss, Treasurer, addressed. "Dear Policy Holder," in which it was stated:

PLAINTIFF'S EXHIBIT 8

"H. S. Weller, President.

Mutual Benefit Health and Accident Association,

Omaha

October 18, 1929.

"DEAR POLICY HOLDER:

During this year, your Association will pay benefits to its policy holders amounting to \$7,500,000.00. In order to handle this vast amount of business and to give all policy holders the very best possible service, it has been decided to establish a Company Branch Office at Memphis, Tennessee.

The Branch Office at Memphis will have a staff of fifteen people, most of whom have been sent from the Home Office

to handle matters pertaining to our business and to give you good service in the handling of any matters pertaining to your insurance.

All claims will be paid through the Memphis Office, so you should notify them in case you are disabled. You should also take up with them any other matters pertaining to your protection with us.

We need a good, capable person in your territory to sell our insurance, and would appreciate it very much if you would give us the name of someone who might be interested in taking up the work for us. A salesman who has been selling books, hosiery, medicine, etc., can make a good income from selling our protection. You would be doing such a party a favor by forwarding his name, in the space provided below, using the enclosed envelope, which does not require any postage.

[fol. 35] Trusting you are well pleased with your policy and that you will continue to recommend us to your many friends, we are

Yours very truly, Mutual Benefit Health & Accident
Ass'n, C. C. Criss, Treasurer.

Name: _____

Address: _____

"The Court: Now what is the objection?

"Mr. Pryor: It could have no possible bearing on the issue in this case. It is a notification there of a change in place—the establishment of a branch office over in Memphis in 1929.

"The Court: The only purpose that I can see that would save—you may introduce that paragraph of it and read that to the Jury, if you desire. That is all. You may have your exceptions to the Court's ruling.

"Mr. Nance: I may state the purpose of it is to show that they had abandoned the requirement to deal with the Omaha Ede.

"Mr. Pryor: I would like to state at this time, to expedite the trial of this case; we are not insisting at all that the premiums, or any of them, had to be paid at Omaha after the establishment of the local treasurer at Rogers.

"The Court: I think perhaps that testimony is all in any way—don't make much difference whether it is permitted or not.

"Mr. Nance: I offer in evidence a letter from the defendant company, dated September 17, 1934, and signed Alvin Laser."

It was received in evidence as Plaintiff's Exhibit No. 9, and is as follows:

[fol. 36]

PLAINTIFF'S EXHIBIT 9

"Mutual Benefit Health and Accident Association,

Omaha

September 17, 1934

"Mr. J. W. Nance, Attorney, Rogers, Arkansas.

In Re William B. Lyon, Deceased

DEAR MR. NANCE:

I received your letter of August 31 with death proof attached in connection with claim filed by Mrs. Zillah Lyon, beneficiary of the above named.

I was in Rogers to see you about this claim on Saturday, September 8, but was advised that you had left that same morning for the Rio Grande Valley. I was very sorry to have missed you, as I was anxious to thoroughly discuss this claim with you.

I have made a very careful investigation of all of the facts surrounding this case, and I regret to advise that it would not be possible for this claim to be approved for payment. A careful check of our records discloses that this policy lapsed for non-payment of premium due July 1, and the reinstatement tendered on July 6 was refused, and according to the provisions of the policy held by Mr. Lyon, the Association was clearly within its rights in refusing this premium.

The writer will be in Fort Smith, Arkansas, at the Ward Hotel tomorrow, Wednesday, and Thursday. If you care to discuss this case personally, and will so advise me, I will be glad to come to Rogers to see you.

With kindest regards, I am

Very truly yours, Mutual Benefit Health & Accident Ass'n. Alvin Laser, Claim Auditor."

AL:CH.

That when she received the letter with the return of the money order she was away on a visit to Oklahoma City, was gone about three days. That she had only been home in Rogers about three-quarters of an hour when she learned that Mr. Lyon had lost his life, and had not seen the letter [fol. 37] when she received that information, and the letter had not reached Mr. Lyon. That when the letter dated July 26 was received it was after Mr. Lyon's death. He died on the 19th.

The following receipts for premiums were identified by plaintiff and admitted in evidence, being in words and figures identical with or similar to the receipt set out in full heretofore, with the exception of the date received and the time for which it continued the policy in force, each being for \$16.00.

PLAINTIFF'S EXHIBIT No. 10

reads in part as follows:

"... does hereby continue in force the said policy from date hereof until twelve o'clock, noon, standard time, Dec. 31, 1927, at which time the next quarterly payment will be due."

Countersigned the 30th day of Sept., 1927, by Local Treasurer.

PLAINTIFF'S EXHIBIT No. 11

reads in part as follows:

"Official Receipt for Premium Due April 1, 1928

"... Payment of this premium receipted for, if made on or before date due keeps your policy in continuous effect, and if made after date due reinstates the policy on date of this receipt as provided in policy, until 12 o'clock, noon, standard time, June 30, 1928, at which time another payment will be due."

Countersigned the 31st day of March, 1928, by Local Treasurer.

PLAINTIFF'S EXHIBIT No. 12

reads in part as follows:

"Official Receipt for Premium Due July 1, 1928

"* * * Payment of this premium receipted for, if made on or before date due keeps your policy in continuous effect, and if made after date due reinstates the policy on date of this receipt as provided in policy, until 12 o'clock, noon, standard time, October 1, 1928, at which time another payment will be due."

Countersigned the 30th day of June, 1928, by Local Treasurer.

[fol. 38]

PLAINTIFF'S EXHIBIT No. 13

reads in part as follows:

"Official Receipt for Premium Due October 1, 1928

(Same as other receipt) "* * * until 12 o'clock noon, standard time, Dec. 31, 1928, at which time another premium will be due."

Countersigned the 29th day of September, 1928, by Local Treasurer.

PLAINTIFF'S EXHIBIT No. 14

reads in part as follows:

"Official Receipt for Premium Due December 31, 1928

(Same as other receipts) "* * * until 12 o'clock noon, standard time, April 1, 1929, at which time another premium will be due."

Countersigned the 29th day of December, 1928, by Local Treasurer, Roy E. Hamilton.

PLAINTIFF'S EXHIBIT No. 15

reads in part as follows:

"Official Receipt for Premium Due April 1, 1929

(Same as other receipts) " * * * until 12 o'clock noon, standard time, July 1st, 1929, at which time another premium will be due."

Countersigned the 30th day of March, 1929, by Roy E. Hamilton, Local Treasurer.

PLAINTIFF'S EXHIBIT No. 16

reads in part as follows:

"Official Receipt for Premium Due July 1, 1929

(Same as other receipts) " * * * until 12 o'clock noon, standard time, October 1st, 1929, at which time another premium will be due."

Countersigned the 1st day of July, 1929, by Roy E. Hamilton, Local Treasurer.

[fol. 39]

PLAINTIFF'S EXHIBIT No. 17

reads in part as follows:

"Official Receipt for Premium Due Oct. 1, 1929

(Same as other receipts) " * * * until 12 o'clock noon, standard time, December 31, 1929, at which time another premium will be due."

Countersigned the 1st day of Oct., 1929, by Roy E. Hamilton, Local Treasurer.

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8

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9



PLAINTIFF'S EXHIBIT No. 18

reads in part as follows:

"Official Receipt for Premium Due April 1, 1930

(Same as other receipts) " * * until 12 o'clock noon, standard time, July 1, 1930, at which time another premium will be due."

Countersigned the 31 day of March, 1930, by Roy E. Hamilton, Local Treasurer.

PLAINTIFF'S EXHIBIT No. 19

reads in part as follows:

"Official Receipt for Premium Due July 1, 1930

(Same as other receipts) " * * until 12 o'clock noon, standard time, October 1, 1930, at which time another premium will be due."

Countersigned the 1st day of July, 1930, by Roy E. Hamilton, Local Treasurer.

PLAINTIFF'S EXHIBIT No. 20

reads in part as follows:

"Official Receipt for Premium Due Oct. 1, 1930

(Same as other receipts) " * * until 12 o'clock noon, standard time, December 31, 1930, at which time another premium will be due."

Countersigned the 30th day of Sept., 1930, by Roy E. Hamilton, Local Treasurer.

[fol. 40] **PLAINTIFF'S EXHIBIT No. 21**

reads in part as follows:

"Official Receipt for Premium Due Dec. 31, 1930

(Same as other receipts) "• • • until 12 o'clock noon, standard time, April 1, 1931, at which time another premium will be due."

Countersigned the 31st day of Dec., 1930, by Roy E. Hamilton, Local Treasurer.

PLAINTIFF'S EXHIBIT No. 22

reads in part as follows:

"Official Receipt for Premium Due April 1, 1931

(Same as other receipts) "• • • until 12 o'clock noon, standard time, July 1, 1931, at which time another premium will be due."

Countersigned the 1st day of April, 1931, by Roy E. Hamilton, Local Treasurer.

PLAINTIFF'S EXHIBIT No. 23

reads in part as follows:

"Official Receipt for Premium Due July 1, 1931

(Same as other receipts) "• • • until 12 o'clock noon, standard time, October 1, 1931, at which time another premium will be due."

Countersigned the 1st day of July, 1931, by Roy E. Hamilton, Local Treasurer.

PLAINTIFF'S EXHIBIT No. 24

reads in part as follows:

"Official Receipt for Premium Due October 1, 1931

(Same as other receipt) " * * * until 12 o'clock noon, standard time, December 31, 1931, at which time another premium will be due."

Countersigned the 1st day of Oct., 1931, by Roy E. Hamilton, Local Treasurer.

[fol. 41]

PLAINTIFF'S EXHIBIT No. 25

reads in part as follows:

"Official Receipt for Premium Due December 31, 1931

(Same as other receipts) " * * * until 12 o'clock noon, standard time, April 1, 1932, at which time another premium will be due."

Countersigned the 31st day of Dec., 1931, by Roy E. Hamilton, Local Treasurer.

PLAINTIFF'S EXHIBIT No. 26

reads in part as follows:

"Official Receipt for Premium Due April 1, 1932

(Same as other receipts) " * * * until 12 o'clock noon, standard time, July 1, 1932, at which time another premium will be due."

Countersigned the 31st day of Mar., 1932, by Roy E. Hamilton, Local Treasurer.

PLAINTIFF'S EXHIBIT No. 27

reads in part as follows:

"Official Receipt for Premium Due July 1, 1932

(Same as other receipts) "• • • until 12 o'clock noon, standard time, October 1, 1932, at which time another premium will be due."

Countersigned the 7th day of July, 1932, by Roy E. Hamilton, Local Treasurer.

PLAINTIFF'S EXHIBIT No. 28

reads in part as follows:

"Official Receipt for Premium Due October 1, 1932

(Same as other receipts) "• • • until 12 o'clock noon, standard time, December 31, 1932, at which time another premium will be due."

Countersigned the 8th day of Oct., 1932, by Roy E. Hamilton, Local Treasurer.

[fol. 42]

PLAINTIFF'S EXHIBIT No. 29

reads in part as follows:

"Official Receipt for Premium Due December 31, 1932

(Same as other receipts) "• • • until 12 o'clock noon, standard time, April 1, 1933, at which time another premium will be due."

Countersigned the 30th day of Dec., 1932, by Roy E. Hamilton, Local Treasurer.

PLAINTIFF'S EXHIBIT No. 30

reads in part as follows:

"Official Receipt for Premium Due April 1, 1933

(Same as other receipts) "• • • until 12 o'clock noon, standard time, July 1, 1933, at which time another premium will be due."

Countersigned the 1st day of April, 1933, by Roy E. Hamilton, Local Treasurer.

PLAINTIFF'S EXHIBIT No. 31

reads in part as follows:

"Official Receipt for Premium Due July 1, 1933

(Same as other receipts) "• • • until 12 o'clock noon, standard time, October 1, 1933, at which time another premium will be due."

Countersigned the 1st day of July, 1933, by Roy E. Hamilton, Local Treasurer.

PLAINTIFF'S EXHIBIT No. 32

reads in part as follows:

● **"Official Receipt for Premium Due Oct. 1, 1933**

(Same as other receipts) "• • • until 12 o'clock noon, standard time, December 31, 1933, at which time another premium will be due."

Countersigned the 30th day of September, 1933, by Roy E. Hamilton, Local Treasurer.

[fol. 43] PLAINTIFF'S EXHIBIT No. 33

reads in part as follows:

"Official Receipt for Premium Due — —, —"

(Same as other receipts) "• • • until 12 o'clock noon, standard time, April 1, 1934, at which time another premium will be due."

Countersigned the 29th day of Dec., 1933, by Roy E. Hamilton, Local Treasurer.

RECITAL AS TO PREMIUM RECEIPTS, ETC.

That the foregoing receipts constitute all of the receipts for premiums paid except the one for the first quarter of 1929 and the one for the last quarter of 1927; that she never received those receipts, "there are two missing;" that she gave a check, which was introduced in evidence, payable to Roy E. Hamilton, and dated Dec. 31, 1927, in the amount of \$16.00. Another check was identified by her and introduced in evidence, dated Dec. 28, 1929, for \$16.00, payable to Roy E. Hamilton, both of which were in payment of the premiums for which she had no receipts.

Cross-examination:

That the policy was purchased in Rogers, Arkansas; Mr. J. T. Cottingham took the application; he is now dead; that she paid a premium of \$74.00 for the first year but did not get a receipt for the same; that Mr. Cottingham said that the policy was a receipt. She made her next premium payment on the 1st of April, 1927. The policy was obtained on the 31st day of December, 1926. She stated in answer to the question:

"Q. Why was it, if you know, that you paid a quarterly premium on the first day of April, 1927, or just three months after you state that you had paid a premium for the entire year?

"A. Well, in order to keep my payments up—because Mr. Cottingham said there was no days of grace included in the policy, but if we paid a year's premium in advance that would take the place of these days of grace."

ORDER ALLOWING APPEAL

Appeal allowed upon appellant furnishing supersedeas bond in compliance with law in the amount of \$4500.00.

Dated this 10th day of July, 1937.

By the Court:

Heartsill Ragon, Judge.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed July 9, 1937

Now comes the defendant, Mutual Benefit Health & Accident Association, and files the following assignment of errors upon which it will rely on appeal to the United States Circuit Court of Appeals for the Eighth Circuit:

I

That said Court erred in overruling defendant's demurrer to the complaint of the plaintiff, over the objections and exceptions of the defendant.

II

That said Court erred in holding that the plaintiff in this action was entitled to have allowed and recover in these proceedings an attorney's fee, as provided by the statutes of the State of Arkansas, over the objections and exceptions of the defendant.

[fol. 50]

III

That the Court erred in overruling defendant's motion to strike the testimony of the plaintiff as follows:

"Mr. Pryor: If the Court please, at this time we desire to move to strike the testimony of Mrs. Lyon regarding her testimony to the effect that she paid seventy-four dollars at the time this policy was applied for on the ground that it is not pleaded in the complaint and is not an issue that is raised by the pleadings in this Court.

"The Court: The motion will be overruled. The Court is of the opinion that the testimony is admissible. Her reason for the payment of this was brought out by the defendant counsel. In the next place, the Court is of the opinion that

this question is raised, and that he overruled the demurrer on the ground that she had paid—the allegation that she had paid the policy up past the date of July 1, 1934. This question was raised on demurrer. The Court at that time thought it was sufficiently alleged, and I still think it is sufficiently alleged, to cover that point. So your motion would be overruled and you may have your exception.

“Mr. Pryor: As I understood the demurrer, if the Court please, at the time the Court overruled the demurrer, the Court’s action was based on allegation of the complaint ‘that said premium had been previously paid and, therefore, was not due and payable on said first day of July, and the insured was not liable for payment of same at said time;’ and that that was the only suggestion at that time which might be taken to have raised this issue.

“The Court: I don’t recall the exact wording, but I do know the allegation—there were three grounds of demurrer. The Court felt that the first ground of the demurrer, I don’t recall what it was now, was properly taken—properly set out. He was doubtful about the second, but the third was based on the question of the efficiency of the allegations of the complaint, and when the Court read the complaint, he was convinced that he did allege that the premium had been paid. So on that ground the third ground, the Court overruled the demurrer.

“Mr. Pryor: As I remember it, though, there was no suggestion by Mr. Nance at that time that the premium had been paid a year in advance at that time the policy was taken out—no statement of that sort made.

“The Court: Mr. Nance started to develop that point, and the Court stopped him and called upon you to give your [fol. 51] opinion about the matter, which you rather frankly did. So the discussion of the matter was rather brief. Have you any further motion?

“Mr. Pryor: Save our exception.

“The Court: Your exception will be noted.

IV

That the court erred in overruling the defendant’s motion for a continuance as follows:

“Mr. Pryor: The defendant, at this time, moves that this cause be continued on the ground of surprise; that the alle-

"Mr. Pryor: As I remember it, though, there was no suggestion by Mr. Nance at that time that the premium had been paid a year in advance at the time the policy was taken out—no statement of that sort made.

"The Court: Mr. Nance started to develop that point, and the Court stopped him and called upon you to give your opinion about the matter, which you rather frankly did. So the discussion of the matter was rather brief. Have you any further motion?

"Mr. Pryor: Save our exception.

"The Court: Your exception will be noted.

MOTION FOR CONTINUANCE

"Mr. Pryor: The defendant, at this time, moves that this cause be continued on the ground of surprise; that the allegations of the complaint do not allege that the policy was kept in force for a year in advance; and on the ground that [fol. 46] the rest of the complaint pleaded an excuse for failure to pay the premium; and that if a continuance is granted, the defendant will be able to make proof to the effect that the seventy-four dollars was not paid or received by the company at the time the policy was issued; and that the defendant in this case had no intimation from the plaintiff or her counsel before this trial that such a contention would be made; and we offer to show by witnesses at this time that no such intimation was ever made and that it was never suggested by Mr. Nance at any time prior to this trial that such a contention would be made at the trial of this case.

"The Court: Well, now, where are your witnesses that you want to prove all of that by?

"Mr. Pryor: We have Mr. Laser and myself.

"The Court: I don't think it makes a bit of difference. I don't think it would be admissible—doubtful if it would be material whether or not he had ever made this statement to you or not, and you are both here ready to testify.

"Mr. Pryor: I don't understand, your Honor.

"The Court: That wouldn't be any ground for a continuance because you gentlemen are here.

"Mr. Pryor: I mean to testify that we never had noticed that such a contention would be made here so that we could have prepared ourselves by obtaining evidence from the home office of the defendant.

"The Court: What would that evidence be?

"Mr. Pryor: The evidence would be that it never received a seventy-four dollar payment when this policy was applied for and issued, and that it only received quarterly premiums from the very beginning, and that it received twenty-six dollars at the time the policy was issued and sixteen dollars quarterly thereafter up to April 1, 1934.

"The Court: The agent who wrote the policy, as I understand it, is dead—the one she claims she paid the money to?

"Mr. Pryor: Yes, sir.

"The Court: The only thing you could do would be to offer testimony here that it was never received at your office.

"Mr. Pryor: Yes, sir.

"The Court: Your motion will be overruled, and you may save your exceptions.

[fol. 47] DEFENDANT'S MOTION FOR INSTRUCTED VERDICT

"Mr. Pryor: Note our exceptions. If the Court please, then the defendant does not desire to put on any evidence, but moves for an instructed verdict on the following grounds: that the policy terminated by its own terms on the first day of July, 1934, and that the defendant herein, as shown by the policy and as the evidence discloses, had the option to reject a premium payment and exercised that option; and on the further ground that the premium receipts, themselves, show that the policy terminated on the first day of July, 1934, prior to the time this loss occurred.

"The Court: Your motion will be overruled.

"Mr. Pryor: Note our exceptions.

INSTRUCTION TO JURY

"The Court: Gentlemen of the Jury, the Court is going to direct you to find the issue in favor of the plaintiff in the sum of \$3678.00.

"Mr. Pryor: Note our exception.

"The Court: All right."

APPROVAL OF BILL OF EXCEPTIONS BY COUNSEL FOR DEFENDANT

The foregoing bill of exceptions contains all of the material evidence offered and received on the trial of said cause, including all rulings made during the course of the trial, which were excepted to by the defendant and exceptions allowed by the court.

Pryor & Pryor, Attorneys for Mutual Benefit Health & Accident Association and Appellant

STIPULATION OF COUNSEL APPROVING BILL OF EXCEPTIONS

It is hereby stipulated and agreed by and between John W. Nance, attorney for the plaintiff, and Pryor and Pryor, attorneys for the defendant, that the proposed bill of exceptions presented herewith, consisting of pages numbered 1 to 21, inclusive, contains a true statement of the proceedings had upon the trial of the cause and contains all of the material evidence produced at the trial of the said cause.

John W. Nance, Attorney for Plaintiff, Pryor & Pryor,
by Thos. B. Pryor, Jr., Attorneys for Defendant.

[fol. 48] IN UNITED STATES DISTRICT COURT

ORDER SETTLING BILL OF EXCEPTIONS

The parties to the above entitled action, through their respective counsel of record, having stipulated in writing that the proposed bill of exceptions presented herewith, consisting of pages numbered 1 to 21 inclusive, contains a true statement of the proceedings had upon the trial of the cause and contains all the material evidence produced at the trial of said cause, and the same having been duly considered by the Judge of this Court who presided at the trial of said cause, and the same appearing to be in all respects proper, I, the undersigned, United States District Judge who presided at the trial of the above entitled cause, do hereby certify that the foregoing bill of exceptions contains all of the material facts and matters, things, proceedings, objections, rulings and exceptions thereto occurring upon the trial of said cause, and not heretofore a part of the record herein, including all evidence adduced at the trial; and I further cer-

tify that the exhibits set forth or referred to, or both, in the foregoing bill of exceptions constitute all the exhibits offered in evidence at the said trial, and I hereby make all of said exhibits a part of the foregoing bill of exceptions; and I hereby settle and allow the foregoing bill of exceptions as a full, true and correct bill of exceptions in this case, and order the same filed as a part of the record herein, and further order the Clerk of this Court to attach to the said bill of exceptions all of the said exhibits not set forth therein and to transmit said entire bill of exceptions, including all exhibits whatsoever to the Circuit Court of Appeals for the Eighth Circuit.

This July 12, 1937.

Heartsill Ragon, Judge.

IN UNITED STATES DISTRICT COURT

[Title omitted.]

PETITION FOR APPEAL—Filed July 9, 1937

To the Honorable Heartsill Ragon, Judge of the District Court Aforesaid:

The above named, Mutual Benefit Health & Accident Association, feeling aggrieved by the verdict of the jury and judgment entered thereon, in the above entitled action on the — day of June, 1937, hereby appeals from said verdict and judgment to the United States Circuit Court of Appeals [fol. 49] for the Eighth Circuit; that the errors upon which such appeal is based are contained in the assignment of errors filed herewith; that petitioner prays that his appeal be allowed and that a citation be issued in accordance with law; and that an authenticated transcript of the record, proceedings, and exhibits on the trial be forwarded to the United States Circuit Court of Appeals for the Eighth Circuit at St. Louis, Missouri.

And your petitioner further prays that an order be made, fixing the amount of security to be given by appellant conditioned as provided by law, and that execution of the judgment be superseded until final determination of said appeal.

Dated this 9th day of July, 1937.

Pryor & Pryor, by Thos. B. Pryor, Jr., Attorneys for Appellant.

That the payment was made with the application.

"Q. You know the policy was delivered to you after he signed the application and it was sent in, do you not?"

"A. Why, yes."

"Q. And then you state that you paid to this man that is since dead seventy-four dollars in cash, taking no receipt [fol. 44] or no memoranda of any kind whatever acknowledging receipt by him of the seventy-four dollars?"

"A. No, he didn't take the money when he first made out the policy. If I remember right, he sent the policy into the company after he made it out."

"Q. You mean he sent the application into the company?"

"A. Yes, sent the application in."

"Q. Then the company afterwards forwarded the policy to you?"

"A. Yes."

That she has lived in Rogers for nineteen years; that her husband was working in Texas; been there twenty-four years; spent the most of his time down there, and she was living at Rogers; that she handled the payment of these premiums as his agent; that she signed her husband's name to checks that were issued in payment of the premiums; that she made the premium payment due April 1, 1934, before the first of April, and the receipt is dated March 30, 1934, at Little Rock, Arkansas; that she had not received written notice that she was to make her payments at the Little Rock office, and stated in answer to the question:

"Q. You knew that you had received a receipt for the premium that had been made for the April 1 payment, did you not?"

"A. Yes, sir."

"Q. By sending to Little Rock. Why didn't you mail this premium to Little Rock?"

"A. Well, because it had been customary for me to pay Mr. Hamilton, and I thought he was the one I should pay to when he was there."

In response to the offer on her part to pay the premium by money order on the 6th day of July to the Little Rock office she received a letter dated July 13, 1934, from Harold R. Parker, General Manager, at Little Rock; that she received this letter the same day that she learned of her husband's

accident; that she received no notice that this premium was due.

"Mr. Nance: We rest.

MOTION TO STRIKE

"Mr. Pryor: If the Court please, at this time we desire to move to strike the testimony of Mrs. Lyon regarding her testimony to the effect that she paid seventy-four dollars at the time this policy was applied for on the ground that it is not pleaded in the complaint and is not an issue that is raised by the pleadings in this Court.

[fol. 45] "The Court: The motion will be overruled. The Court is of the opinion that the testimony is admissible. Her reason for the payment of this was brought out by the defendant counsel. In the next place, the Court is of the opinion that this question is raised, and that he overruled the demurrer on the ground that she had paid—the allegation that she had paid the policy up past the date of July 1, 1934. This question was raised on demurrer. The Court at that time thought it was sufficiently alleged, and I still think it is sufficiently alleged, to cover that point. So your motion would be overruled and you may have your exception.

"Mr. Pryor: As I understood the demurrer, if the Court please, at the time the Court overruled the demurrer, the Court's action was based on allegation of the complaint 'that said premium had been previously paid and, therefore, was not due and payable on said first day of July, and the insured was not liable for payment of same at said time;' and that that was the only suggestion at that time which might be taken to have raised this issue.

"The Court: I don't recall the exact wording, but I do know the allegation—there were three grounds of demurrer. The Court felt that the first ground of the demurrer, I don't recall what it was now, was properly taken—properly set out. He was doubtful about the second, but the third was based on the question of the efficiency of the allegations of the complaint, and when the Court read the complaint, he was convinced that he did allege that the premium had been paid. So on that ground, the third ground, the Court overruled the demurrer.

gations of the complaint do not allege that the policy was kept in force for a year in advance; and on the ground that the rest of the complaint pleaded an excuse for failure to pay the premium; and that if a continuance is granted, the defendant will be able to make proof to the effect that the seventy-four dollars was not paid or received by the company at the time the policy was issued; and that the defendant in this case had no intimation from the plaintiff or her counsel before this trial that such a contention would be made; and we offer to show by witnesses at this time that no such intimation was ever made and that it was never suggested by Mr. Nance at any time prior to this trial that such a contention would be made at the trial of this case.

"The Court: Well, now, where are your witnesses that you want to prove all of that by?

"Mr. Pryor: We have Mr. Laser and myself.

"The Court: I don't think it makes a bit of difference. I don't think it would be admissible—doubtful if it would be material whether or not he had ever made this statement to you or not, and you are both here ready to testify.

"Mr. Pryor: I didn't understand, your Honor.

"The Court: That wouldn't be any ground for a continuance because you gentlemen are here.

"Mr. Pryor: I mean to testify that we never had notice that such a contention would be made here so that we could have prepared ourselves by obtaining evidence from the home office of the defendant.

"The Court: What would that evidence be?

"Mr. Pryor: The evidence would be that it never received a seventy-four dollar payment when this policy was applied for and issued, and that it only received quarterly premiums [fol. 52] from the very beginning, and that it received twenty-six dollars at the time the policy was issued and sixteen dollars quarterly thereafter up to April 1, 1934.

"The Court: The agent who wrote the policy, as I understand it, is dead—the one she claims she paid the money to.

"Mr. Pryor: Yes, sir.

"The Court: The only thing you could do would be to offer testimony here that it was never received at your office.

"Mr. Pryor: Yes, sir.

"The Court: Your motion will be overruled, and you may save your exceptions.

"Mr. Pryor: Note our exceptions."

V

That the court erred in overruling the defendant's motion for an instructed verdict as follows:

"Mr. Pryor: If the Court please, then the defendant does not desire to put on any evidence, but moves for an instructed verdict on the following grounds: that the policy terminated by its own terms on the first day of July, 1934, and that the defendant herein, as shown by the policy and as the evidence discloses, had the option to reject a premium payment and exercised that option; and on the further ground that the premium receipts, themselves, show that the policy terminated on the first day of July, 1934, prior to the time this loss occurred.

"The Court: Your motion will be overruled.

"Mr. Pryor: Note our exceptions."

VI

That the court erred in instructing the jury to return a verdict for the plaintiff as follows:

"The Court: Gentlemen of the Jury, the Court is going to direct you to find the issue in favor of the plaintiff in the sum of \$3678.00.

"Mr. Pryor: Note our exception.

"The Court: All right."

VII

That the Court erred in entering judgment on the verdict, as there is no substantial evidence to sustain the verdict.

[fol. 53]

VIII

That the Court erred in directing a verdict for the plaintiff as the plaintiff's evidence regarding the \$74.00 payment cannot be said to be conclusive.

IX

That the verdict and judgment are contrary to law.

Wherefore, the defendant, Mutual Benefit Health & Accident Association, and appellant prays that the judgment in said cause be reversed and the cause remanded with instructions to the trial court as to further proceedings therein, and for such other and further relief as may be just in the premises.

Pryor & Pryor, by Thos. B. Pryor, Jr., Attorneys
for Appellant,

Supersedeas bond on appeal for \$4,500.00, approved and filed July 10, 1937, omitted in printing.

[fol. 54] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO CONTENTS OF TRANSCRIPT ON APPEAL—
Filed July 20, 1937

It is hereby stipulated and agreed by and between John W. Nance, attorney for the plaintiff, and Pryor & Pryor, attorneys for the defendant, that the following be incorporated in the transcript of record on appeal to the United States Circuit Court of Appeals for the Eighth Circuit in the above entitled cause:

1. Transcript of removal.
 2. Defendant's answer.
 3. First amended complaint.
 4. Demurrer to amended complaint.
 5. Order overruling demurrer. Defendant's exception.
 6. Answer to first amended complaint.
 7. Verdict of the jury.
 8. Order allowing \$250.00 for plaintiff's attorney's fee. Defendant's exception.
 9. Order denying plaintiff's application for assessment of penalty. Plaintiff's exception.
 10. Judgment.
 11. Defendant's notice of appeal in open court.
- [fol. 55] 12. Order allowing defendant ninety days within which to file bill of exceptions.

13. Order staying execution.
14. Bill of exceptions and order settling same.
15. Petition for appeal.
16. Assignment of errors.
17. Order allowing appeal.
18. Supersedeas bond with approval thereon.
19. Citation with admission of service.
20. Stipulation for transcript of record on appeal.
21. Clerk's certificate.

Dated this 18th day of July, 1937.

Pryor & Pryor, Attorneys for Appellant. John W.
Nance, Attorney for Appellee.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 56] Appearances of counsel omitted in printing.

[fol. 57] Order of submission, December 6, 1937, omitted in printing.

[fol. 58] IN UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT, MARCH TERM, A. D. 1938

No. 10,982

MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION,
Appellant,

vs.

MRS. ZILLAH LYON, Appellee

Appeal from the District Court of the United States for the
Western District of Arkansas

Mr. G. Byron Dobbs (Mr. Thomas B. Pryor and Mr.
Thomas B. Pryor, Jr., were on the brief) for appellant.

Mr. John W. Nance filed brief for appellee.

Before Stone, Gardner and Woodrough, Circuit Judges

OPINION—March 19, 1938

Woodrough, Circuit Judge, delivered the opinion of the court:

This appeal is to reverse a judgment for plaintiff in a suit upon an insurance policy.

It appears that on December 31, 1926, the Mutual Benefit Health and Accident Insurance Association issued its policy insuring the plaintiff's husband, William R. Lyon, against accidental death (and other hazards, including sickness) in pursuance to an application in writing signed by him and [fol. 59] made part of the insurance contract. The application was in question and answer form, and in response to the question, "What is the premium?", the answer was "\$16.00 quarterly." It appears that premium payments of \$16.00 were made each and every quarter after the issuance of the policy up to and including April 1st, 1934, and it is not disputed that the insurance was thereby kept in force until July 1, 1934. But no further payment of premium was made on or before said first day of July, 1934. Mr. Lyon suffered death from bodily injuries sustained through purely accidental means within the meaning of the policy on July 12, 1934, and the association having refused payment after proof of loss, the widow, who is the beneficiary in the policy, brought this action at law, praying recovery upon the policy for the total amount therein provided for accidental death, increased as specified in the policy because it had been continued in force seven years. The jurisdictional amount was involved and diversity of citizenship existed.

It was alleged in the amended complaint upon which the case was tried that the insured had paid all premiums and had fully performed the conditions and requirements of the policy, and that it was in full force and effect at the time of the accidental death of the insured, and there were further allegations as follows:

"By the terms of provision 'C' aforesaid, the defendant company attempted to provide that said premiums must be paid at the home office in Omaha, Nebraska, on the day same became due and payable, but plaintiff alleges that the defendant appointed an agent in the City of Rogers,

Arkansas, designated by the defendant as its local treasurer to collect premiums from the insured and other policy holders, with apparent authority to waive the time for payment of premiums and that said local treasurer by long continued practice, without objection upon the part of the defendant company, established the custom of receiving premiums out of time, and it was for a long period of years customary for said local treasurer to receive payment of premiums from the insured at any time it was most convenient for the insured to make such payments, and the defendant thereby waived its right to declare a forfeiture of the rights of the insured under said policy, because of failure to pay said premiums at the home office in Omaha, Nebraska, on the day same became due and payable.

[fol. 60] "That on and prior to the first day of January, 1934, one Roy E. Hamilton was the authorized and acting agent and local treasurer of the defendant company in the city of Rogers, Arkansas, duly authorized to collect premiums from the insured and other policy holders, and had been acting in such capacity for the defendant company for a period of more than five years; that the insured had been accustomed to pay his premiums to said agent during all of said time; that by the terms of said policy of insurance the defendant company was required to give the insured notice of the time said premiums were due and payable; that the defendant company, without any notice to the insured, changed its method of collecting premiums and required same to be paid in the city of Little Rock, Arkansas, and that said premiums be sent by mail to an agent of the defendant company in said city of Little Rock, instead of being paid to said local treasurer; that on the first day of July, 1934, the plaintiff, acting as agent for the insured, attempted to pay said premium to the said local treasurer of the defendant company; that said plaintiff was unable to locate said agent for several days, but finally on the 6th day of July, 1934, plaintiff located said agent and was by him informed that the custom of paying the premiums had been changed and that payment should be made to the defendant's agent in the city of Little Rock, Arkansas; that the plaintiff, acting as agent for the insured, went immediately to the United States Postoffice in said city of Rogers and purchased a postal money order for the sum of \$16.00, made payable to the defendant, and [deposited]

same in the postoffice, properly addressed to the defendant, which was in due time received by the defendant; that the defendant refused to accept payment of said premium on the ground that it was not paid on the first day of July, 1934, and the defendant now claims a forfeiture of said policy of insurance on the ground that said premium was not paid on said first day of July. The plaintiff alleges that the defendant was without right to claim and declare a forfeiture of said policy for the non-payment of said premium on said first day of July for the following reasons, to-wit:

"First. That defendant had failed and neglected to give the insured notice of the time said premium was due and payable as required by the terms of said policy.

[fol. 61] "Second. That the defendant, by its acts and conduct in establishing a custom of receiving payment of premiums out of time and of changing the method of payment from that provided in the policy had waived its right to declare a forfeiture for non-payment of said premium on said first day of July.

"Third. That said premium had been previously paid and therefore was not due and payable on said first day of July and the insured was not liable for payment of same at said time.

"That it is provided in part (C) of said policy of insurance as follows, to-wit:

"After the first year's premium has been paid, each year's renewal of this policy shall add \$200.00 to the death benefit until the same amounts to \$4000.00."

"That after the payment of the first year's premium said policy of insurance was renewed each year, beginning with the first day of January, 1928, and including renewals for each year thereafter to and including the year 1933, making six annual renewals, which entitled the plaintiff to the sum of \$200.00 for each renewal, in the total sum of \$1200.00.

"That in a rider attached to said policy it is provided as follows:

"In event of the accidental death of the insured under the provisions of this policy, providing this policy has been in force for one year, the company agrees to pay in addition

to the amount otherwise payable, an amount equal to all of the premiums paid by the insured on this policy, plus compound interest at the rate of 4% per annum from the date of the payment of each of said premiums to the date of death of the insured.' "

"That the insured paid all premiums due thereon in the sum of \$464.00, and an additional sum of \$48.00; that under said clause plaintiff is entitled to recover the sum of \$478.00, including interest at the rate of 4% annually.

"That the plaintiff is entitled to recover of and from the defendant company benefits in the total sum of \$3678.00."

[fol. 62] A true copy of the policy sued on was attached to the amended complaint.

The answer of the association contained specific denials but admitted the execution and delivery of the policy and that the insured lost his life from accidental causes on July 19th, 1934. It was alleged that the first day of July, 1934, was the last day to which premium had been paid in advance and that the policy expired by its own terms on that date, and that under the provisions of the insurance contract the association had the right to refuse to extend the insurance for any period of time beyond the period for which the premium had been paid in advance, and that it did refuse to insure for any additional period of time beyond the first day of July, 1934. The association "denies that the defendant by its acts and conduct established a custom of receiving payments of premiums out of time; denies that it changed the method of payment from that provided in the policy, and denies that it waived its right to declare a forfeiture for the nonpayment of said premium on the 1st day of July, and specifically denies that said premium had been previously paid and, therefore, was not due and payable on said 1st day of July."

It was further pleaded that the following provisions of the policy presented a bar to recovery by the plaintiff:

"The term of this policy begins at twelve o'clock noon, standard time, on date of issue . . . and ends at twelve o'clock noon on date renewal is due."

" . . . The acceptance of any premium on this policy shall be optional with the Association, . . . "

On the trial of the case the plaintiff testified that she was present with her husband when the insurance was obtained

and a liberal interpretation of part of her testimony made by her counsel was:

"During the negotiations with the local agent, in which both insured and the plaintiff participated, it was discovered that the premiums were to be paid upon a specific date and that no days of grace were allowed; that if premiums were not paid on the date specified, the policy would lapse and [fol. 63] insured would forfeit the insurance. They objected to that feature for the reason stated, that there might be times when insured would be out of employment and consequently be unable to meet premium payments on time. To obviate this objection, the agent recommended that they pay a full year's premium in advance and then go on with quarterly premiums in the regular way, and by that means insured would always have his premiums paid-up far enough in advance to bridge him over any unforeseen inability to pay on time, and thus the insured was induced to pay the first year's premium in advance and he elected to pay subsequent annual premiums in quarterly installments, beginning on the first day of April, 1927, which was expiration date of the first quarter after the policy was issued. The payment of the first year's premium in the sum of \$74.00 was made to the agent and the policy was thereupon delivered to the insured."

The plaintiff also testified that as agent for her husband she continued to make quarterly payments upon the policy and never missed a payment up to and including the payment of April 1, 1934, which carried the insurance to July 1, 1934. She made that last payment by postal money order mailed by her to the branch office of the association at Little Rock, Arkansas, and it was there received and receipted for by the association. Mrs. Lyon also stated that she had complained to the local collecting agent of the association about his being out of the office and delaying her payments and that he had said to her:

"Now, Mrs. Lyon, don't you worry about that. Anybody that I know is good for these premiums I make out the receipt on the first of the month, anyway, and then when you are down town sometime, and I am in the office or it is convenient, you can step in and pay me."

That she made the payments that way, paid them just any place she could catch him and at any time that it was con-

venient; that most of the time it would be the first of the month when the money would come and that she would always take it and pay Mr. Hamilton. The question was put to her, "The question is, were you delayed and made your payment after the first of the month?", and she answered "Yes, sir, several times."

[fol. 64] On the first day of July, 1934, plaintiff appeared at the office of the collector for the association at Rogers, Arkansas, but was unable to find him then or at any time until July 5th when he told her to send the premium for the policy to Little Rock. She complied with his suggestion on the next day by mailing a money order in the correct amount to the association there. The association received the money order but mailed it back to the assured with the following letter:

"DEAR MR. LYON:

"You will find inclosed the money order in the amount of \$16.00, which you sent us to reinstate your policy #60J-20343, and we regret that it will not be possible for us to accept this payment as the Home Office did not send us an official receipt for you.

"We note that you are past the age of sixty years, but we are today writing our Home Office, and asking if it will be possible to make an exception in your case, and allow you to continue keeping your policy in force with the Thirty Day Elimination Endorsement attached. Kindly advise if you would desire to keep your policy in force if our Home Office will attach a Thirty Day Elimination Endorsement. This endorsement will mean that you will not be paid any benefits during the first thirty days of any period of disability, but should you be disabled over a long period of time, you would have the same protection as you previously had, starting on the 31st day.

"Just as soon as we receive a reply from our Home Office, we will write you, and we are enclosing a self-addressed envelope for your convenience in advising us if you would desire to keep your policy in force with the endorsement attached."

When this letter from the association was delivered at her home, Mrs. Lyon was away on a visit and on her return home word came to her of her husband's death before she opened

the letter. Mrs. Lyon produced and the court received in evidence all of the quarterly premium receipts which had been issued by the association except one for the last quarter of 1927 and one for the first quarter of 1929. For both of these Mrs. Lyon had her cancelled checks in the amount of \$16.00 each paid to the agent of the association. Each of the receipts issued by the association contained the declaration [fol. 65] that the "payment of this premium receipted for . . . keeps your policy in continuous effect . . . until 12 o'clock noon standard time [of a day specified exactly three months later than the receipt date] at which time another payment will be due."

Mrs. Lyon was the sole witness. Upon the conclusion of her testimony the association indicated that it did not desire to put on any evidence but moved for an instructed verdict in its favor. The motion was overruled and exceptions to the ruling were preserved. There was a verdict for the plaintiff under the court's direction and judgment thereon, and upon this appeal the contentions are presented:

(1) that the insurance involved was term insurance only for the term for which premium was paid in advance; that acceptance of any premium was optional with the association and it exercised its option and rejected the premium tendered after July 1, 1934, and (2) that there was no competent or substantial evidence to sustain plaintiff's allegation that the insured had paid all premiums and kept the policy in force and effect at the time of death.

1. It is not contended that the sick benefit provisions of the policy in suit which prevent the association from cancelling the insurance during any period of disability of the insured are applicable to the situation here presented. Here the claim is solely for the amounts payable under the policy for accidental death. But counsel for plaintiff points to the provisions of the policy whereby the amounts payable for accidental death are substantially increased upon each year's renewal of the policy after the first year's premium has been paid. If such accidental death occurs during the first year while the policy is in force only two thousand dollars is payable, but annual increase of two hundred dollars per year is promised until the amount of insurance for accidental death reaches four thousand dollars after twenty full year's premiums have been paid, and thereafter the accidental death benefit of four thousand dollars may be con-

tinued at a small yearly cost. Furthermore, a rider upon the policy promises that after the policy has been in force one year an additional amount, equal to all the premiums that have been paid plus compound interest thereon, shall be added to the amount of insurance for accidental death otherwise provided in the policy.

[fol. 66]. It has been ably contended that these provisions of the policy worked such a change in the insurance that it ceased to be term insurance and became in effect assimilated to life time insurance, terminable like life insurance only upon notice for failure to pay premiums after full opportunity to pay had been given. It is argued that under these provisions an insured builds up an increasing interest of value in the policy and that it would be harsh to let him be deprived of such increase at the option of the association. But we are not persuaded that the promise to make the additions to the accidental death benefits if the policy should be continued, change the nature of the insurance. It is observed that the increases in the amounts promised by the policy do not apply to the numerous other hazards covered but only to loss by accidental death, and it is not contended that the increase would cause the insurance to become unprofitable to the association or that there was any fraud in the transaction. The practice of including similar promises in accident insurance policies is not uncommon and we are not cited to any case which supports the contention that such increase of benefits works a change in the nature of the insurance. The policy very clearly provides that its term begins at twelve o'clock noon on the date of issue and ends at twelve o'clock noon on date renewal is due, and each and every receipt issued to and accepted and retained by the insured reiterated that the payment receipted for kept the insurance in force until 12 o'clock noon of the specifically named first day of the next quarter. And the declaration of the clause (c) of the policy that "the acceptance of any premium on this policy shall be optional with the association," is equally unequivocal (notwithstanding other provisions found in the same clause.*) We think the terms of

"The acceptance of any premium on this policy shall be optional with the Association, and should the premium provided for herein be insufficient to meet the requirements of this policy, the Association may call for the difference as required."

with April 1, 1927, was required to keep the policy in effect, and with the statement in the application that the premium was payable quarterly manifest the intent of the parties to contract for insurance on the quarterly payment plan. The insured began making quarterly payments of \$16.00 immediately before the date April 1, 1927, and kept them up each quarter for years, and that is what the parties meant and intended should be done.

[fol. 69] The policy evidenced a contract of term insurance which the association had a right to discontinue at any date when renewal was due. By its letter refusing a renewal receipt and returning the postal money order it did terminate the policy. The proposal to enter into a different contract was not acted upon. The term of insurance was ended prior to the accident.

Reversed and remanded.

SEPARATE OPINION

STONE, Circuit Judge, separate opinion:

I concur in the result reached in the majority opinion that this case should be reversed. I am unable to concur with the grounds stated therein for reversal.

I think the case should be reversed because of error in the peremptory instruction in favor of plaintiff. It seems to me that whether the insured had paid three-quarters of a year in advance, as testified to by plaintiff, was a matter for determination by the jury.

It seems to me that there is enough in the policy itself to justify the position of the plaintiff that there had been a payment in advance of enough money to carry this policy past the date of death. The provision in the policy which seems to me to carry this meaning is "additional provision (c)", which is set forth in the majority opinion.

When the entire policy, including the application, is considered, there can be no doubt that the annual premium on this policy was \$64.00, to be paid in quarterly amounts of \$16.00 each, and that such quarterly premiums were payable in advance. With these provisions as to premium and payment beyond question, the other provisions in the first sentence of "(c)" seem to me of determining importance.

Those provisions must be read in the light of the fact that this insurance was issued and became effective December 31, 1926.

At the above date provision (c) declared that "this policy is issued in consideration of the statements made by the insured in the application and the payment in advance [fol. 70] of (\$74.00) Dollars the first year; and the payment in advance of premiums of (\$64.00) Dollars annually or (\$16.00) Dollars quarterly thereafter beginning with April 1, 1927, is required to keep this policy in continuous effect." On its face this statement is rather puzzling and, apparently, contradictory. First it states the consideration for the issuance of the policy to be the statements in the application "and the payment in advance of (\$74.00) Dollars the first year." This statement alone would clearly mean that the premium for the first year was to be paid in advance in the amount stated. The following part of the sentence sets forth that "to keep this policy in continuous effect" it is necessary to make "payment in advance of premiums of (\$64.00) Dollars annually or (\$16.00) Dollars quarterly thereafter, beginning with April 1, 1927." Thus the apparently anomalous situation is presented of a requirement of an advance payment of \$74.00 covering the first year premium for a year which would begin December 31, 1926, and the requirement of a yearly premium of \$64.00 or quarterly payments of \$16.00 "beginning with April 1, 1927," which is only three months after the policy is issued.

It seems to me the above situation is so anomalous and ambiguous that it requires evidence to make it clear. It will not do to brush aside either the requirement of advance payment of \$74.00 for the first year or the payments of \$64.00 (or \$16.00 quarterly) beginning with April 1, 1927. Each of these is a requirement of the policy itself. Plaintiff offered evidence explaining this apparent anomaly. It seems to me that her explanation, if true, is satisfactory. It makes these provisions of the policy understandable and removes the ambiguity or conflict arising from them.

Also, I do not think it of determining importance that the policy itself does not acknowledge receipt of the \$74.00. In this respect the only inquiry is whether that amount was paid. If it was paid the policy itself shows what it was paid

the policy reserved to the association the right to refuse renewal of the policy on July 1, 1934.

2. As to the claim that the policy was paid up to the time of death. We consider first Mrs. Lyon's testimony concerning the oral agreement, between her deceased husband and the agent of the association, also deceased, at the time of the trial. By the terms of that oral agreement the association [fol. 67] was to receive from the insured and keep a sum equal to three quarterly premiums (\$48.00), and if at any time thereafter Mr. Lyon should fail to pay any quarterly payment the association was to apply sixteen dollars out of the \$48.00 to such payment and so keep the insurance in effect.

We observe that the policy provided: "This policy . . . contains the entire contract of insurance," and "no agent has authority to change this policy or to waive any of its provisions. No change in this policy shall be valid unless approved by an executive officer of the association and such approval be endorsed hereon."

We think it clear that Mrs. Lyon's testimony as to her husband's oral arrangement with the deceased agent of the association was incompetent to change or extend the insurance contract sued on. The term character of the insurance and its expiration dates were definitely fixed by the policy and by the renewal receipts issued to and retained by the insured every three months for more than seven years. The policy provisions prevent recovery upon oral testimony of agreement with the local agent that the insurance was not to end as prescribed in the policy at "noon on the date renewal was due," or that the association was to continue the insurance contrary to the option reserved to it by the policy. *Gill v. Mutual Life Insurance Co.*, (C. C. A. 8) 63 F. (2d) 967 l. c. 970, 971; *Kitcart v. Metropolitan Life Insurance Co.* (C. C. A. 8) 88 F. (2d) 407 l. c. 410.

In the latter case the court said: "The contract between plaintiff and defendant upon which the law action was predicated was a written contract, and what might have been said to plaintiff by a mere solicitor would not have been binding upon the insurance company in the face of the provisions in its policy." The court held that provisions similar to those in the policy at bar constituted "a direct limitation upon the authority of any soliciting agent to bind the company by oral conversations outside of the written terms of the policy and the application." *Mutual Life Insurance*

Co. of New York v. Hilton-Green, 241 U. S. 613, 36 S. Ct. 676, 60 L. Ed. 1202; New York Life Insurance Co. v. Fletcher, 117 U. S. 519, 6 S. Ct. 837, 29 L. Ed. 934; New York Life Insurance Co. v. McCreary (C. C. A. 8) 60 F. (2d) 355.

But the plaintiff also put reliance upon a provision of the policy itself referred to as "additional provision (C)." [fol. 68] That is the only clause of the policy which indicates the price at which the insurance was issued and in which the amount of the premium required to be paid is set forth. It reads:

"(c) The copy of of the application indorsed hereon is hereby made a part of this contract and this policy is issued in consideration of the statements made by the Insured in the application and the payment in advance of (\$74.00) Dollars the first year; and the payment in advance of premiums of (\$64.00) Dollars annually or (\$16.00) Dollars quarterly thereafter, beginning with April 1, 1927, is required to keep this policy in continuous effect. If any such dues be unpaid at the office of the Association in Omaha, Nebraska, this policy shall terminate on the day such payment is due. The mailing of notice to the Insured at least fifteen days prior to the date they are due shall constitute legal notice of dues."

On casual inspection the reference in the clause to the "payment in advance of \$74.00" might seem to imply an acknowledgment by the association that it had received a payment in advance for a year in the said sum of \$74.00, but more careful consideration of the contract convinces that the association did not intend to, and did not declare or acknowledge anywhere in the writing that it had actually received such sum or that it had received a year's premium. The meaning of the words of the policy taken in connection with the application for the policy is that the insurance was payable in advance and that the rate was \$74.00 per annum for the first year and \$64.00 per annum thereafter; that the insured elected to pay for the insurance in payments of \$16.00 per quarter and that the date April 1, 1927, written into the form was the date upon which the first paid up term expired and when the first renewal was due. The declaration of the application that the premium for the policy was \$16.00 quarterly, taken with the provision of the clause (c) that payment of \$16.00 quarterly beginning

for. The testimony of plaintiff was positive and direct that it had been paid.

Thus we have the situation of undisputed payments of \$16.00 a quarter beginning April 1, 1927, up to and including April 1, 1934. We have the testimony of plaintiff that \$74.00 was paid at the time the policy issued. We have the requirement in the policy that \$74.00 be paid in advance and [fol. 71] that this payment was for "the first year" which began December 31, 1926. We have the situation that there is no contention that any amount was paid at the time of issuance of the policy except that made by the plaintiff, which is that \$74.00 was then paid, from which it follows that unless that amount was paid there was no payment whatsoever for the insurance from its date of issue to April 1, 1927. Nowhere in the policy can there be found any semblance of a reason to believe that deceased was to receive three months of insurance without payment of premium. I am unable to escape the conclusion that the policy itself contains provisions which require explanation and that plaintiff was entitled to the judgment of the jury on the verity of the explanation to which she testified.

A true copy.

[fol. 72] IN UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT

No. 10982

MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION,
Appellant,

VS.

MRS. ZILLIAN LYON

JUDGMENT—March 19, 1938

Appeal from the District Court of the United States for
the Western District of Arkansas

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Arkansas, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause be, and the same is hereby, re-

versed with costs; and that the Mutual Benefit Health and Accident Association have and recover against Mrs. Zillah Lyon the sum of One Hundred Sixty-Four and 15/100 Dollars for its costs in this behalf expended and have execution therefor.

And it is further ordered by this Court that this cause, be, and the same is hereby, remanded to the said District Court.

[fol. 73] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

EXCEPTIONS AND MOTION FOR REHEARING—Filed April 1, 1938

Comes now the appellee, by the undersigned, her attorney of record, and respectfully states to the Court that she desires to and does hereby except to the judgment of the Court in this cause and to each finding and conclusion upon which same is based, and moves the Court to grant her a rehearing herein to the end that there may be reconsideration of the questions of law and fact involved herein and for grounds of exception and motion for rehearing, appellee states and contends as follows, to-wit:

[fol. 74] First. That the Court has failed to consider and give due effect to Clause C of the contract sued upon and has erred in its finding, that the premium for the first year was to be paid in installments and that it negatives the privilege of paying the full amount in advance and the authority of the agent to collect the sum of \$74.

Second. That the Court has erroneously interpreted the first provision of Clause C of the contract and has failed to give due consideration and effect to the fact that it clearly deals only with the payment of the premium for the first year and which alone recites the consideration upon which the policy was issued.

Third. That the Court has failed to give consideration and effect to the uncontroverted fact that if any provision of the policy is to be construed as acknowledging receipt of payment of the first premium, it is a receipt for the sum of \$74, because no other sum is mentioned.

Fourth: That the Court has failed to give due consideration and effect to the second provision of Clause "C" of the policy contract which clearly deals only with payment after premium for the first year has been paid.

Fifth. That the Court in holding that the testimony of appellee, to the effect that the premium for the first year was paid in advance, tends to contradict, or vary the terms of the written contract has failed to give due consideration and effect to the undisputed evidence that the contractual obligation of the insured, relating to payment of premium for the first year is limited to payment of \$74, and that no attempt is made to provide that the premium must be paid in quarterly installments.

Sixth. That the Court has failed to give due consideration and effect to the second provision of Clause "C" of the contract which provides that premiums may be paid, either in a lump sum of \$74 in advance, or in quarterly installments of \$16 in advance, and that if this provision has application to payment of the premium for the first year, that premium could also be paid either in a lump sum of \$74 in advance or \$26 in advance and \$16 quarterly thereafter in advance.

Seventh. The Court has failed to give consideration and effect to the well established rule of law providing that recitals of consideration in deeds and other contracts in writing are not conclusive and that parole evidence is always [fol. 75] admissible to prove the actual consideration even in the absence of allegation or proof of fraud.

Eighth. That the Court has failed to give due consideration and effect to the well established rule of law that written receipts for the payment of money are only prima facie evidence of payment and same may be rebutted by parole evidence showing the actual amount paid.

Ninth. That the Court has failed to give consideration and effect to the well established rule of law which provides that where there is ambiguity or conflict in the policy provisions, same must be construed strictly against the insurer and literally in favor of the insured.

Tenth. That the Court has failed to give consideration and effect to the rule of law which provides that debtors under contract for deferred payments of insurance premiums; rents under term leases; purchase price of realty and

personalty, the amount and time of which deferred payments are fixed by the terms of the written contract, have lawful right to prove actual payment in advance of the time and in sums greater than provided in the contract.

Eleventh. That the Court has failed to give consideration and effect to the fact that the same rules of evidence that apply to proof of payments of premiums in suits to recover the proceeds of the policy, also apply in suits to recover premiums due, and that a ruling to the contrary amounts to hold that if suit had been brought against insured in his lifetime, to recover premiums for the first year, he would have been denied the right to prove previous payment in advance, a ruling which finds no support in either justice or precedent worthy of consideration.

Twelfth. That the Court failed to give due consideration and effect to the undisputed proof that the terms of the contract do not limit the initial payment of premiums to be collected by appellant's agent to an installment of \$16 or any other sum less than \$74 and that there is a total absence of proof to show that appellant's agent acted in excess of authority.

Thirteenth. That the Court has failed to give consideration and effect to the fact that there is a total absence of proof in the record to negative the inference that appellant received the sum of \$74 premium paid to its agent in advance for the first year.

[fol. 76]. Fourteenth. That the Court has failed to give consideration and effect to the uncontroverted fact that appellant's agent was authorized to collect the first premium without limitation as to the amount to be collected.

Fifteenth. That the Court failed to give consideration and effect to the fact that appellee's testimony to the effect that the first year's premium was paid in advance is undisputed and uncontroverted and therefore it was the duty of the trial court to direct a verdict for plaintiff.

Sixteenth. That this Court erroneously construed the terms of the insurance contract to confer power upon the appellee to refuse to extend the contract of insurance after July 1st, 1934.

Seventeenth. That the Court erroneously construed the contract to be one of term insurance.

Wherefore, the appellee insists that her exceptions herein should be made a proper part of the record and duly considered and further insists that the judgment of the Court is erroneous and therefore appellee is entitled to a rehearing, and to a judgment affirming the judgment of the trial court, and, in event this Court holds that the judgment of the lower with directions to grant a new trial and for all of such relief the appellee will ever pray.

(Signed) Mrs. Zillah Lyon, Appellee, by John W. Nance, her attorney.

CITY OF WASHINGTON,
District of Columbia:

The undersigned, attorney of record for the above named appellee, does hereby certify that the above and foregoing exceptions and motion for rehearing is not filed for the purposes of vexation or delay but because he believes that there is merit in said exceptions and said motion and same is filed in order that justice may be done in the premises.

John W. Nance, Attorney of Record, for Appellee.

[fol. 77] [File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING—April 11, 1938

The petition for rehearing filed by counsel for appellee in this cause having been considered. It is now here ordered by this Court that the same, be, and it is hereby, denied.

[fol. 78] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 79] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified

copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Filed No. 42,674. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 189. Mrs. Zillah Lyon, petitioner, vs. Mutual Benefit Health and Accident Association. Petition for a writ of certiorari and exhibit thereto. Filed July 8, 1938. Term No. 189, O. T., 1938.

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U. S. Supreme Court, U. S.

FILED

JUL 8 1938

PAULS LANE UNKLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1938

Mrs. ZILLAH LYON

Petitioner,

v.

No. 189

MUTUAL BENEFIT HEALTH AND ACCIDENT
ASSOCIATION

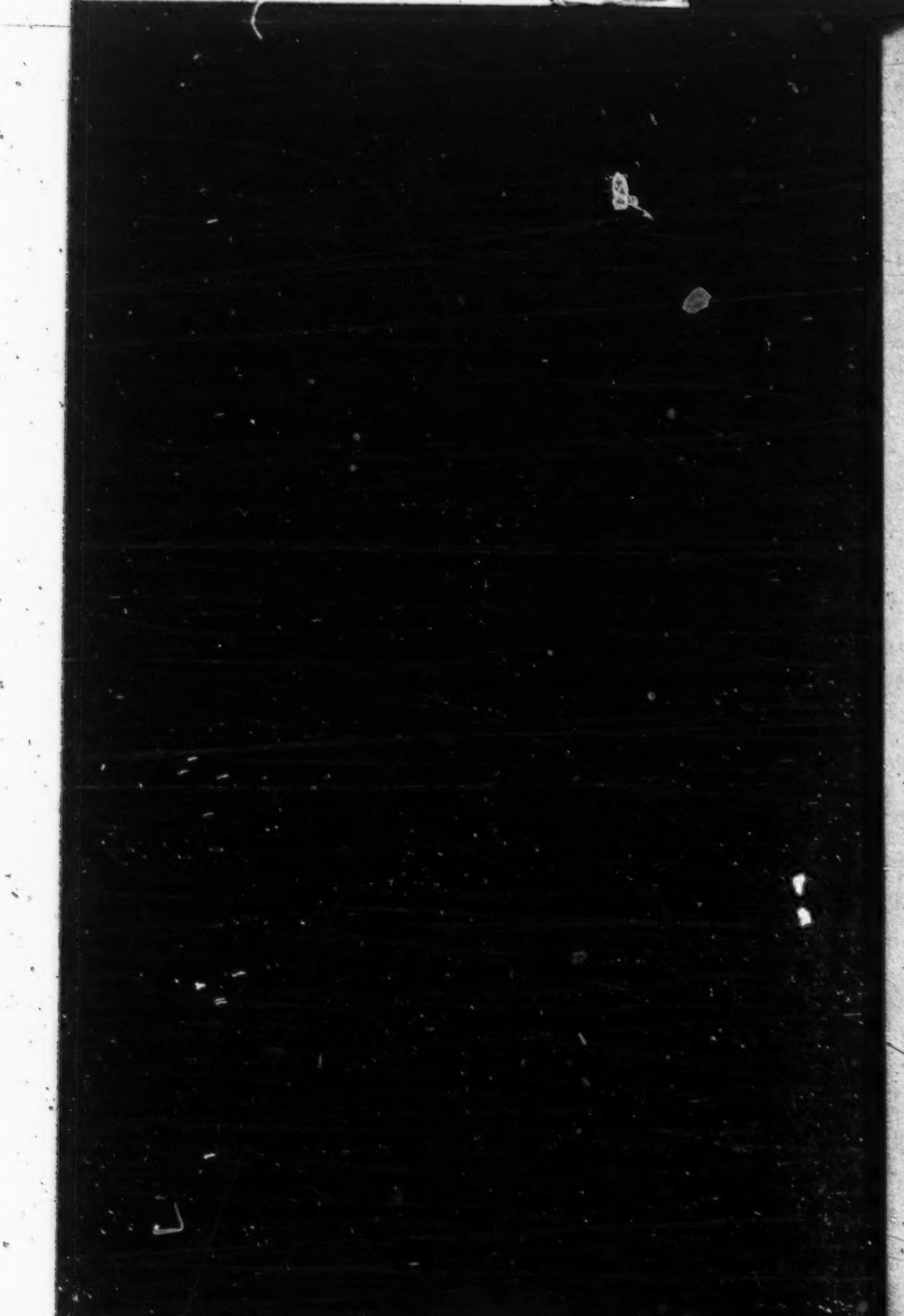
Respondent.

PETITION FOR WRIT OF CERTIORARI AND
SUPPORTING BRIEF

JOHN W. NANCE,

of Rogers, Arkansas,

Counsel for Petitioner.



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Supreme Court of the United States

OCTOBER TERM, 1938

Mrs. ZILLAH LYON *Petitioner,*

v.

No.

MUTUAL BENEFIT HEALTH AND ACCIDENT
ASSOCIATION *Respondent.*

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices
of the Supreme Court of the United States:

Your petitioner respectfully shows to this Honorable Court that on the 31st day of October, 1936, petitioner commenced an action in the Circuit Court of Benton County, in the State of Arkansas to recover on a policy of insurance in which she is named beneficiary issued by the above-named Mutual Benefit Health and Accident Association, hereafter called respondent, by the terms of which it insured petitioner's husband, Wm. R. Lyon, against loss of life from accidental causes. The respondent by appropriate action removed the cause of action into the District Court of the United States for the Western District of Arkansas and thereafter petitioner filed an amended com-

plaint to which respondent filed a general demurrer. The general demurrer was overruled. Verdict was directed in favor of plaintiff and judgment duly entered thereon, from which respondent appealed. The Circuit Court of Appeals reversed the judgment of the District Court.

Statement of the Matters Involved

The policy sued upon was issued on the 31st day of December, 1926, and recites the following consideration, which is found in clause "C" on page 3 of the policy, to-wit:

"The copy of the application endorsed hereon is hereby made a part of this contract and this policy is issued in consideration of the statements made by the insured in the application and the payment in advance of \$74 the first year."

In this clause is also set forth the terms upon which the policy may thereafter be kept in continuous effect, as follows:

"* * * and the payment in advance of premiums of \$64 annually or \$16 quarterly thereafter, beginning with April 1, 1927, is required to keep the policy in continuous effect."

This clause also contains provisions governing premium payments as follows:

"If any such dues are unpaid at the office of the Association in Omaha, Nebraska, this policy shall terminate on the date such premium is due.

"The acceptance of any premium on this policy shall be optional with the Association and should the premium provided for herein be insufficient to meet the requirements of this policy, the Association may call for the difference as required."

Clause "D" contains the following provision, which apparently conflicts with other provisions:

"The term of this policy begins at twelve o'clock noon standard time on date of issue against accident and on the thirty-first day after date of issue against disease and ends at twelve o'clock noon on date any renewal is due."

The death benefit payable without increase is \$2,000, but Part "C" on the first page of the policy and the rider on the third page provide for attractive increases in benefits as follows:

Part "C": "After the first year's premium has been paid, each year's renewal of this policy shall add \$200 to the death benefit until same amounts to \$4,000. When twenty full annual premiums have been paid the death benefit of \$4,000 as herein provided may be continued in force thereafter at a yearly cost of \$4 without medical examination."

The rider on page 3 provides:

"In event of the accidental death of the insured under the provisions of this policy providing the policy has been in force for one year the Company agrees to pay in addition to the amount otherwise payable an amount equal to all the premiums paid by the insured on the policy plus compound interest at the rate of 4% per annum from the date of the payment of each of said premiums to the death of the insured" (R. 25).

The policy provides for the payment of the premiums at the home office of the Association in the city of Omaha, Nebraska, but prior to the time this policy was issued the Association had appointed one J. T. Cottingham as its local treasurer stationed at the city of Rogers in the State of

Arkansas with authority to solicit insurance, collect premiums and deliver policies (R. 26).

The receipt issued for the first quarterly payment was countersigned by the local treasurer for the Association and contains the following material recital:

"The Mutual Benefit Health and Accident Association in consideration of the payment of the premium due and subject to provisions of the policy held by insured and the statements and answers in the application signed by the insured, which the insured by the acceptance of this receipt repeats and declares to be true and agrees shall be the basis of his contract of insurance, does hereby continue in force the said policy from date hereof until twelve o'clock noon standard time July 1, 1927, at which time the next quarterly premium will be due. Yours truly, C. G. Criss. Counter signed this 25th day of March, 1927.

"By: J. T. Cottingham, Local Treasurer" (R. 27).

Each subsequent receipt contains identical recitals excepting date and each was signed by Roy E. Hamilton, Local Treasurer, except the last one, which is signed by Harold B. Parker, Local Treasurer. The material recitals read as follows:

"The payment of this premium receipted for if made on or before date due keeps your policy in continuous effect and if paid after date due reinstates the policy on date of this receipt as provided in policy until twelve o'clock noon standard time October 1, 1927, at which time another payment will be due" (R. 29-37 to 43).

At the trial the testimony showed that all premiums due on the policy had been paid and receipted for excepting the premium due on the 1st day of July, 1934 (R. 28).

The Association prior to July 1, 1927, appointed one Roy E. Hamilton to succeed Mr. Cottingham as its local treasurer at the said city of Rogers, who collected each and every premium due from the insured prior to the 1st day of April, 1934. The Association without notice to the insured changed its method of collecting premiums and required that same be paid to its local treasurer in the city of Little Rock, Arkansas. The petitioner, who acted as agent for the insured in the payment of all premiums, had been accustomed to make payment at the office of the local treasurer for a period of more than seven years and the local treasurer gave express consent to the payment of premiums out of time and on numerous occasions received payments of premiums after date same were due and payable (R. 28 and receipts R. 29-37 to 43).

When the premium came due on the 1st day of April, 1934, petitioner appeared at the local treasurer's office to make the payment. He was absent. A girl child was present in the office who informed petitioner that the local treasurer was absent and suggested that the premium would have to be sent to Little Rock, Arkansas, and gave petitioner the name of the person to whom it could be sent but gave petitioner no information or intimation that Mr. Hamilton was no longer the local treasurer authorized to collect premiums. Petitioner sent the quarterly premium to Little Rock and received a receipt for same but no notice that future premiums should be sent to Little Rock was given her (R. 29).

When the premium came due on the 1st day of July, 1934, petitioner appeared at the office of the local treasurer

to pay the premium but the office was closed and the local treasurer absent. Petitioner immediately set about to locate the local treasurer, but was unable to do so until the fifth day of the month at which time she found the local treasurer at his office and tendered him the premium. The local treasurer refused to receive the premium, saying: "Didn't you receive notice?" Petitioner replied that she had not received any notice. Then the local treasurer advised petitioner that the premium would have to be sent to Little Rock. Petitioner sent the premium to Little Rock by postal money order but same was refused on the ground that payment was tendered out of time (R. 30).

The petitioner was the only witness in the trial. She identified the policy sued upon and same was introduced and received in evidence. She testified that all requirements of the policy had been met, and this is undisputed, except the matter of payment of premium for the first year in advance (R. 24).

Petitioner testified on direct examination that when the application for the insurance was made she was present; that the application was sent in to the company and the policy was later delivered to the insured; that the premium for the first year in the sum of \$74 was paid in advance at the time the policy was delivered; that she paid a part of the first year's premium and that her husband paid the balance (R. 24-27).

On cross-examination by counsel for respondent, petitioner testified as follows:

"That the policy was purchased in Rogers, Arkansas; Mr. J. T. Cottingham took the application; he is now dead;

that she paid a premium of \$74 for the first year but did not get a receipt for the same; that Mr. Cottingham said the policy was a receipt. She made her next premium payment on the 1st of April, 1927. The policy was obtained on the 31st day of December, 1926.

"Q. Why was it, if you know, that you paid a quarterly premium on the 1st day of April, 1927, or just three months after you said that you had paid a premium for the entire year?

"A. Well, in order to keep my premiums up—because Mr. Cottingham said there was no days of grace included in the policy, but if we paid a year's premium in advance that would take the place of these days of grace" (R: 43).

After all the testimony was in, counsel for the defendant presented to the Court an oral motion to strike that part of petitioner's testimony relating to the payment of the first year's premium, as follows:

"Mr. Pryor: If the Court please, at this time we desire to move to strike the testimony of Mrs. Lyon regarding her testimony to the effect that she paid \$74 at the time this policy was applied for on the ground that it is not pleaded in the complaint and is not an issue that is raised by the pleadings in this Court" (R. 44-45).

The Court overruled the motion to strike and commented as follows:

"The Court: The motion will be overruled. The Court is of the opinion that the testimony is admissible. Her reason for the payment of this was brought out by the defendant's counsel. In the next place the Court is of the

opinion that this question is raised and that he overruled the demurrer on the ground that she had paid—the allegation that she had paid the policy up past the date of July 1, 1934. This question was raised on demurrer. The Court at that time thought it was sufficiently alleged, and I still think it is sufficiently alleged, to cover that point. So your motion will be overruled and you may have your exception” (R. 45).

The material allegations of the complaint bearing on the question of payment of the premiums are as follows:

“That on December 31, 1926, the defendant issued and delivered to Wm. R. Lyon, plaintiff's deceased husband, a policy of life insurance, by the terms of which said defendant for and in consideration of the sum of \$74 premium for the first year *paid in advance* and the sum of \$64 annually thereafter payable in *quarterly* instalments of \$16 each in advance, *beginning on the 1st day of April, 1927.*

“That on the 19th day of July, 1934, while said policy was in full force and effect, the said Wm. R. Lyon lost his life by accidental causes; that notwithstanding all dues and premiums *had been paid* on said policy and the insured and plaintiff had fully performed the conditions and requirements of said policy and made due demand for payment, defendant has failed and now refuses to pay the sum due thereon.

“That the insured paid all premiums due thereon in the sum of \$464 and an additional sum of \$48; that the defendant was without right to claim or declare a forfeiture

of said policy for nonpayment of said premium on said 1st day of July for the following reasons, to-wit:

"Third. That said premium had been previously paid and therefore was not due and payable on said 1st day of July and the insured was not liable for payment of same at said time" (R. 12-13).

Counsel for respondent declining to offer any evidence, moved the Court to direct a verdict in favor of respondent as follows:

"That the policy terminated by its own terms on the 1st day of July, 1934, and that the defendant herein, as shown by the policy and as the evidence discloses, had the option to reject the premium payment and exercised that option; and on the further ground that the premium receipts, themselves, show that the policy terminated on the 1st day of July, 1934, prior to the time this loss occurred" (R. 47).

The motion was overruled. The Court upon its own motion directed the jury to return a verdict in favor of the plaintiff in the sum of \$3,678 and judgment was duly entered, to which action the defendant excepted and by appropriate steps appealed to the United States Circuit Court of Appeals for the 8th Circuit (R. 47).

The assignments of error material in the consideration of the case here are that the Court erred in overruling the defendant's demurrer to the complaint; in overruling the defendant's motion to strike testimony of the plaintiff with reference to the payment of the first year's premium in advance; in overruling the defendant's motion for an

instructed verdict; in directing a verdict for the plaintiff (R. 49 to 53).

The Circuit Court of Appeals in the majority opinion held that by reason of the policy provision that "no agent has authority to change the policy or waive its provisions" and that "no change shall be valid unless approved by an executive officer of the company and endorsed on the policy," the local treasurer was not authorized to make the oral agreement concerning premium payments and that the testimony of Mrs. Lyon relating to payment of the \$74 in advance is incompetent; that the respondent acted within its rights in refusing the premium tendered on July 6, 1934, and in terminating the contract, and that petitioner can not recover on the policy (R. 58 to 69).

Questions Presented

1st. Where the insured stated in the application that premiums would be paid quarterly, but upon advice of the local treasurer, having authority to solicit insurance, collect the initial and renewal premiums, and deliver the policy, insured paid the \$74 for the first year in advance and elected to pay quarterly premiums thereafter beginning on April 1, 1927, so as to keep premiums paid a year in advance to take the place of days of grace, was this action of the local treasurer in excess of his apparent authority which insured was lawfully justified in relying upon?

2nd. Where plaintiff testified, without objection, that \$74 for the first year were paid in advance, and counsel for defendant, on cross-examination of plaintiff, elicited testimony proving the same fact and also proving the conversa-

tions and oral agreements, between the insured and the local treasurer, relating to payment of the premiums, did the admission and consideration of such testimony by the trial court constitute reversible error?

3rd. Is a provision in the policy limiting authority of respondent's agents binding on insured before delivery of the policy and in the absence of any proof tending to charge the insured with notice of such limitation?

4th. Where counsel for defendant, without first having objected to the testimony when offered and after the evidence was all in moved to strike the testimony of Mrs. Lyon, relating to payment in advance of the \$74 for the first year, upon the specific ground, that such payment is not pleaded in the complaint and is not an issue raised by the pleadings, and the trial court held that such payment was sufficiently pleaded and the testimony responsive to that issue, and the testimony was not challenged upon any other or different ground, can the admissibility of that testimony be held error on appeal upon the new and different ground that it tends to change and extend the terms of the written contract?

5th. Where the policy provides that it is issued in consideration of statements in the application and payment in advance of \$74 for the first year, and that payment of \$64 annually or \$16 quarterly thereafter in advance is necessary to keep the policy in continuous effect; provides for payment of death benefits in the sum of \$2,000 during the first year; provides that after the policy has been in force one year the benefits shall increase at the rate of \$200 annually until benefits amount to \$4,000; provides that if death

from accidental causes occurs after the policy has been in force one year the company will pay, in addition to other benefits payable, a sum equal to all premiums paid with 4% interest compounded from date of payment; provides that if twenty full years' premiums have been paid on the policy the amount of insurance then in force may be carried at a premium of only \$4 annually without medical examination; provides that if premiums are not paid at the home office at the time provided the policy will become void on the day renewal premium is due; for each premium paid a receipt was issued reciting that payment of the premium due continues the policy in force till the 1st day of the succeeding quarter when another premium payment will be due; the policy was continued in force until extra benefits in the sum of \$1,678 had been earned by insured's faithful performance of the contract, were these provisions, recitals, and circumstances, and respondent's course of action relative to performance, sufficient to impress the contract with the character of lifetime insurance and justify a construction that it was the intent of the parties that punctual payment of the premiums would entitle the insured to continue the policy in force and enjoy the extra benefits earned notwithstanding other conflicting provisions.

Reasons Relied on for Issuance of Writ

I.

The application for the insurance was made and the policy delivered in the State of Arkansas, therefore the policy is an Arkansas contract and the rights of the parties thereunder should be adjudicated in conformity to the laws of that State. The judgment of the trial court reflects the

law of the case as declared by the Supreme Court of Arkansas. Each holding of the Circuit Court of Appeals is in conflict with the decisions of that Court. The laws of the State in which the contract is made and to be performed are the rules of decision in Federal Courts in cases of this nature.

Erie v. Thompkins, 82 L. ed. 787, decided by this Court 4-25-38.

John G. Rhulin v. New York Life Ins. Co., 82 L. ed. 823, decided by this Court 5-2-38.

Mutual Benefit Health & Accident Ass'n v. Lena Bowman, decided by this Court 5-31-38.

II

The holding that the testimony of Mrs. Lyon is incompetent and that the local treasurer's action in receiving the first year's premium in advance was unauthorized is in conflict with the following decisions of the Supreme Court of Arkansas, holding that an agent of an insurance company having authority to solicit insurance, deliver policies, and collect premiums, is a general agent for all purposes within the apparent scope of the agency.

Queen of Arkansas Ins. Co. v. Malone, 111 Ark. 229.

Concordia Fire Ins. Co. v. Mitchell, 122 Ark. 357.

Caldwell v. Fitzhugh, 175 Ark. 806.

These holdings are also in conflict with the decisions of this Court.

California Ins. Co. v. Union Compress Co. 133 U. S. 418.

Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 542.

McMaster v. New York Life Ins. Co., 183 U. S. 25.

III.

The holdings that the term of the policy is limited to the period intervening between the date a premium is paid and the date the next quarterly premium becomes due and payable, and that respondent had lawful right to terminate the contract, are in conflict with the following decisions of the Supreme Court of Arkansas holding that where the provisions of the contract are conflicting and for that reason susceptible to different meanings the one most favorable to the insured must be adopted as reflecting the intent of the parties.

United Order of Good Samaritans v. Grigsby, 180 Ark. 610.

Life & Casualty Ins. Co. of Tennessee v. Ford, 172 Ark. 1098.

Pfeiffer v. Missouri State Life, 174 Ark. 783.

- These holdings are also in conflict with decisions of this Court.

National Bank v. Ins. Co., 95 U. S. 673.

IV.

The Circuit Court of Appeals held in effect that by consideration of the evidence of the plaintiff relating to payment of the premium for the first year in advance the trial court committed reversible error. This ruling is in

conflict with the well-established rule of procedure that requires a specific objection to the testimony challenged; a ruling on the objection and an assignment of error setting out the testimony objected to and the reasons for the objections, and is in conflict with former decisions of the Circuit Court of Appeals for the 8th Circuit.

Board of Com'rs of Kearney, Kan., v. Irvin 126 Fed. 689.

Kruse v. Snyder, 87 Fed. (2d) 723.

Lehman v. Burnes National Bank, 20 Fed. (2d) 897.

This holding is also in conflict with decisions of other Circuit Courts of Appeals.

5th Circuit

Gallot v. U. S., 87 Fed. 446.

6th Circuit

Garrett v. Pope Motor Co., 168 Fed. 905.

7th Circuit

Atlas Distilling Co. v. Rhenstrom, 86 Fed. 224.

9th Circuit

Lewis v. Standard Oil Co., 88 Fed. (2) 897.

Wherefore your petitioner prays that a writ of certiorari may issue and that the judgment of the United States Circuit Court of Appeals for the 8th Circuit may be reversed and all appropriate relief awarded to petitioner.

Respectfully submitted,

JOHN W. NANCE.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The majority opinion of the Appeals Court and concurring opinion appear at R. 57 to 69, inclusive. To preserve brevity same are not copied here.

Jurisdictional Statement

The jurisdiction of this court is invoked under the provisions of Sec. 240 (a) of the Judicial Code as amended by the Act of Feb. 13, 1925, Sec. 347 (a), Title 28 U. S. Code.

The plaintiff is a citizen of the State of Arkansas and the defendant is an insurance corporation domiciled in the State of Nebraska. The amount involved is \$3,678, exclusive of interest.

The judgment of the Court of Appeals reversing the judgment of the District Court was entered March 19, 1938. Motion for rehearing was filed April 1, 1938. Judgment overruling motion for rehearing was entered April 11, 1938 (R. 69 to 71).

Specifications of Error

The Circuit Court of Appeals erred:

1st. In holding that the testimony of Mrs. Lyon relating to the payment of \$74 for the first year in advance is incompetent and therefore inadmissible.

2nd. In holding that the action of the local treasurer in collecting the \$74 for the first year in advance and consenting to premium payments out of time was in excess of his authority and therefore not binding on respondent.

3rd. In holding that the policy contract is one of term insurance which respondent could lawfully discontinue at any premium paying date and therefore petitioner cannot recover on the contract.

4th. In holding that the District Court erred in directing a verdict for plaintiff and in reversing the judgment of the District Court.

ARGUMENT

Specification No. 1

The Circuit Court of Appeals clearly erred in holding the testimony of Mrs. Lyon relating to payment of the first year's premium in advance to be incompetent and inadmissible. That part of her testimony brought out on direct examination was not objected to, therefore the motion to strike was properly overruled. This contention is well supported by the weight of authority.

Failure to object to the testimony and assign the ruling of the Court as error is fatal to respondent's right to challenge the competency and admissibility of the testimony on appeal. Such has long been the rule in the Circuit Court of Appeals for the 8th Circuit and is the rule in all Federal Courts.

Board of Com'rs of Kearney, Kan., v. Irvin, 126 Fed. 689.

Kruse v. Snyder, 87 Fed. (2d) 723.

Lehman v. Burnes National Bank, 20 Fed. (2d) 897.

Lewis v. Standard Oil Co., 88 Fed. (2d) 512, 9th Ct.

Garrett v. Pope Motor Co., 168 Fed. 905, 6th Ct.

Atlas Distilling Co. v. Rhenstrom, 86 Fed. 224, 7th Ct.

Gallot v. U. S., 87 Fed. 446, 5th Ct.

Counsel for respondent moved to strike the testimony on the specific ground that it was not responsive to the

pleadings. On appeal the Court held it was incompetent because it tended to change and extend the written contract. That question was not raised by respondent in the trial court, neither was it raised or urged by respondent in the appeals court. The trial court was not asked to rule on that question, therefore respondent waived and lost its right to challenge the competency of the testimony on that ground.

In the case of *Lehman v. Burnes National Bank, supra*, a similar question was presented and it was there held that a party cannot object on one ground in the trial court and rely on an entirely different ground in the Court of Appeals. But this case presents a much more anomalous situation. Here we find the appeals court reversing the trial court for the admission and consideration of testimony brought out by counsel for the appellant.

Specification No. 2 -

The Court of Appeals erred in its conception of the transaction between the insured and respondent's local treasurer. That transaction does not involve any material change or extension of the terms of the contract. It is not uncommon for a policyholder to deposit funds with the insurance company to meet premium payments subsequently coming due. The arrangement was to keep premiums paid in advance to take the place of days of grace.

The policy in plain terms requires the payment of \$74 in advance and in equally plain terms provides that the subsequent annual premiums may be paid in one sum of \$64 in advance or quarterly instalments of \$16 in advance.

No liberal interpretation of the policy provisions would require the \$74 for the first year to be paid in quarterly instalments. It must be paid in advance, but not quarterly, and the policy was unmistakably written so as to conform to the arrangement between the insured and the local treasurer. If ambiguous the provision must be resolved against the respondent.

Life & Casualty Ins. Co. of Tennessee v. Ford, 172 Ark. 1098.

Parol evidence is admissible to aid in the interpretation or construction of the policy where there is ambiguity in its provisions.

33 C. J., p. 115, Sec. 840.

California Ins. Co. v. Union Compress Co., 133 U. S. 418.

Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 542.

The local treasurer, having authority to solicit the insurance, collect initial and renewal premiums, and deliver the policy, was a general agent for all purposes within the scope of his agency and had apparent authority to make special arrangements with insured relating to payment of premiums.

Queen of Ark. Ins. Co. v. Malone, 111 Ark. 229.

Concordia Fire Ins. Co. v. Mitchell, 122 Ark. 357.

Caldwell v. Fitzhugh, 175 Ark. 806.

The local treasurer was not an ordinary soliciting agent. His designation as local treasurer gave him an apparent

official character and justified insured in dealing with him as an official of the respondent company in charge of its business affairs generally at Rogers, Arkansas, with authority to waive strict compliance with requirements relative to premium payments.

In the case of *Caldwell v. Fitchugh*, above cited, the soliciting agent of a life insurance company, without authority from his principal, promised orally to make the insured a loan. The insurance company was also in the business of making loans. The Supreme Court of Arkansas held that the soliciting agent was a general agent in soliciting the insurance and collecting the premium and therefore could bind his principal with the promise to make the loan, notwithstanding he acted contrary to instructions, but without the insured's knowledge.

The insured in this case had no actual or constructive notice of any limitation on authority of the local treasurer. No limitation was expressed in the application. The limitation expressed in the policy came too late to bind insured in the preliminary negotiations.

32 C. J. 1065, Sec. 141.

Hartford Fire Ins. Co. v. Wilson, 187 U. S. 467.

Mutual Benefit Life Ins. Co. v. Robinson, 58 Fed. 723.

Peoples Fire Ins. Ass'n v. Goyne, 79 Ark. 315.

16 L. R. A. (N. S.) 1180.

Provisions for payment of renewal premiums are separable and not applicable to payment of first premium.

McMaster v. New York Life Ins. Co., 183 U. S. 25.

Specification No. 3

Where two provisions of the policy are conflicting the one most favorable to the insured will be adopted as reflecting the intent of the parties.

United Order of Good Samaritans v. Grigsby, 180 Ark. 610.

National Bank v. Ins. Co., 95 U. S. 673.

Where the policy contains conflicting provisions which make the contract as a whole susceptible to different meanings, the Court will ascertain the true intent of the parties.

13 C. J., pp. 520-56, Secs. 481-497.

Where it contains provisions that impress it with the essential character of lifetime insurance as does the one here involved; offers attractive rewards for continuous performance; enables insured, by continuous performance, to build up a one hundred per cent increase of benefits which he may carry for only \$4 annually without medical examination after payment of premiums for twenty years; provides for additional payment of a sum equal to all premiums paid with compound interest, an extraordinary saving and investment feature, all of which is lost if the policy is terminated; a receipt is issued for each premium payment, reciting not that the policy will terminate at the next premium paying date, but that on that date another premium payment will be due, reason and justice would seem to compel a construction allowing such provisions to prevail over a conflicting provision that would under strict

construction authorize an arbitrary termination of the contract and thus deprive insured of his earned benefits.

Under the construction given this policy by the Appeals Court it was permissible for respondent to receive premium payments for the full twenty-year period, then discontinue the contract to avoid carrying the liability at the reduced premium rate. Such a construction is condemned by its own injustice. The conclusion that this policy was intended by the parties to be lifetime insurance is inescapable and when construed so as to effectuate that intent it provides for termination by respondent only for breach by the insured.

The respondent is a mutual association. Dividends are not distributed direct to the policyholders, but it is contemplated that they will participate in the earnings on basis of annual increase of benefits and return of premiums with interest added.

It may be fairly assumed that premium rates are fixed to provide for payment of the increase of benefits. By payment of the initial premium insured's rights are limited to protection in the sum of \$2,000 for the first year but by payment of renewal premiums he acquired a vested right to participate in the earnings of the Association on basis of increased benefits. To hold otherwise is to nullify the contractual obligation of respondent to give effect to the provisions for rights and benefits to be earned by continuous payment of the premiums.

Respondent terminated the premium collecting agency without notice to insured. That was the sole reason for

delay in payment of the premium due July 1, 1934. Termination of the agency was not binding on the insured without notice.

32 C. J. 1062, Sec. 37.

State Life Ins. Co. v. Murray, 159 Fed. 408.

Burlington Ins. Co. v. Threlkeld, 60 Ark. 539.

Specification No. 4

The testimony of petitioner relating to payment of the premium for the first year in advance is undisputed. The respondent did not offer any evidence in the trial, but relied solely on questions of law. If the trial court correctly decided the questions of law and the undisputed evidence of petitioner is legally competent, or if incompetent and respondent, by failure to object and by proving the same facts by testimony elicited from the witness by its own counsel, waived its right to challenge the testimony on appeal, the action of the trial court in directing a verdict was not error and the judgment should have been affirmed.

Arthur v. Morgan, 112 U. S. 495.

Anderson County v. Beal, 113 U. S. 227.

Pollock v. Bush, 128 U. S. 446.

If there are facts or circumstances that impair the conclusiveness of the testimony of petitioner, the question of whether the \$74 premium was paid in advance would necessarily become a jury question.

State Life Ins. Co. v. Murray, 159 Fed. 408.

Leather M'f'g National Bank v. Morgan, 117 U. S. 96.

It is respectfully urged that the judgment of the District Court is correct and that the writ of certiorari should be allowed and the case remanded to the Circuit Court of Appeals with directions to affirm it.

Ritzer v. Ward, 109 U. S. 18.

Ft. Scott v. Hickman, 112 U. S. 165.

Respectfully submitted,

JOHN W. NANCE,

Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1938

MRS. ZILLAH LYON

Petitioner,

v.

No. 189

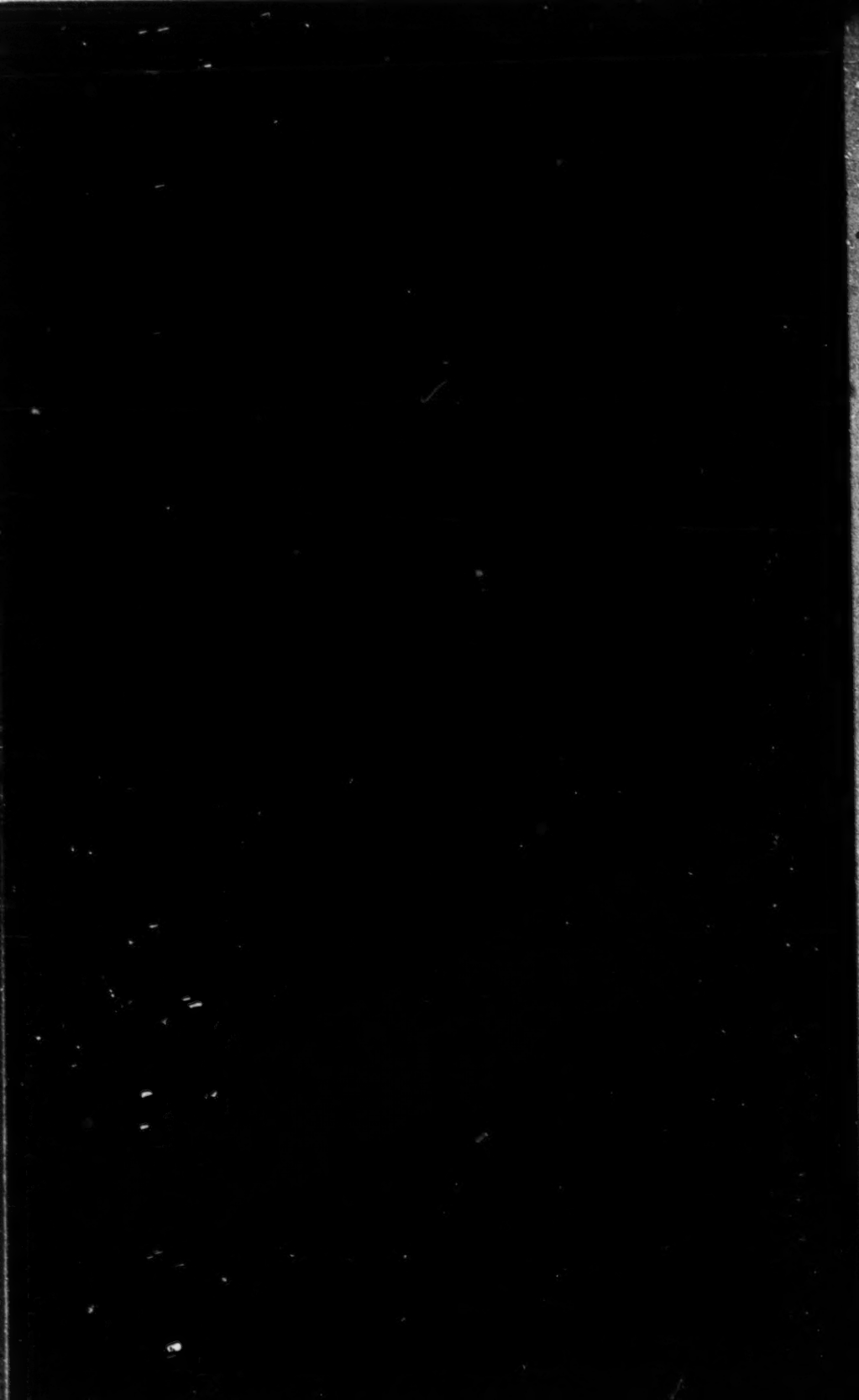
**MUTUAL BENEFIT HEALTH AND ACCIDENT
ASSOCIATION**

Respondent.

**STATEMENT, BRIEF AND ARGUMENT FOR
PETITIONER**

JOHN W. NANCE,

Attorney for Petitioner.



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Supreme Court of the United States

OCTOBER TERM, 1938

MRS. ZILLAH LYON _____ *Petitioner,*

v.

No. 189

MUTUAL BENEFIT HEALTH AND ACCIDENT
ASSOCIATION _____ *Respondent.*

STATEMENT, BRIEF AND ARGUMENT FOR PETITIONER

STATEMENT OF THE CASE

To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:

Your petitioner respectfully shows to this Honorable Court that on the 31st day of October, 1936, petitioner commenced an action in the Circuit Court of Benton County in the State of Arkansas to recover on a policy of insurance in which she is named beneficiary issued by the above-named Mutual Benefit Health and Accident Association, hereafter called respondent, by the terms of which it insured petitioner's husband, Wm. R. Lyon, against loss of life from accidental causes. The respondent by appropriate action removed the cause of action into the District Court of the United States for the Western District of Arkansas, and thereafter petitioner filed an amended com-

plaint to which respondent filed a general demurrer. The general demurrer was overruled. Verdict was directed in favor of plaintiff and judgment duly entered thereon, from which plaintiff appealed. The Circuit Court of Appeals reversed the judgment of the District Court.

JURISDICTIONAL STATEMENT

The jurisdiction of this court is invoked under the provisions of Sec. 240 (a) of the Judicial Code as amended by the Act of Feb. 13, 1925, Sec. 347 (a), Title 28 U. S. Code.

The plaintiff is a citizen of the State of Arkansas and the defendant is an insurance corporation domiciled in the State of Nebraska. The amount involved is \$3,678, exclusive of interest.

The judgment of the Court of Appeals reversing the judgment of the District Court was entered March 19, 1938. Motion for rehearing was filed April 1, 1938. Judgment overruling motion for rehearing was entered April 11, 1938 (R. 69 to 71).

Petition for Writ of Certiorari to review the judgment of the Circuit Court of Appeals was filed in this Court on 8th day of July, 1938, and the petition was granted on the 10th day of October, 1938.

STATEMENT OF THE MATTERS INVOLVED

The policy sued upon was issued on the 31st day of December, 1926, and recites the following consideration, which is found in clause "C" on page 3 of the policy, to-wit:

"The copy of the application endorsed hereon is hereby made a part of this contract and this policy is issued in consideration of the statements made by the insured in the application and the payment in advance of \$74 the first year."

In this clause is also set forth the terms upon which the policy may thereafter be kept in continuous effect, as follows:

" . . . and the payment in advance of premiums of \$64 annually or \$16 quarterly thereafter, beginning with April 1, 1927, is required to keep the policy in continuous effect."

This clause also contains provisions governing premium payments as follows:

"If any such dues are unpaid at the office of the Association in Omaha, Nebraska, this policy shall terminate on the date such premium is due."

"The acceptance of any premium on this policy shall be optional with the Association and should the premium provided for herein be insufficient to meet the requirements of this policy, the Association may call for the difference as required."

Clause "D" contains the following provision, which apparently conflicts with other provisions:

"The term of this policy begins at twelve o'clock noon standard time on date of issue against accident

and on the thirty-first day after date of issue against disease and ends at twelve o'clock noon on date any renewal is due."

The death benefit payable without increase is \$2,000, but Part "C" on the first page of the policy and the rider on the third page provide for attractive increases in benefits as follows:

"Part 'C': 'After the first year's premium has been paid, each year's renewal of this policy shall add \$200 to the death benefit until same amounts to \$4,000. When twenty full annual premiums have been paid the death benefit of \$4,000 as herein provided may be continued in force thereafter at a yearly cost of \$4 without medical examination.'"

The rider on page 3 provides:

"In event of the accidental death of the insured under the provisions of this policy providing the policy has been in force for one year the Company agrees to pay in addition to the amount otherwise payable an amount equal to all the premiums paid by the insured on the policy plus compound interest at the rate of 4% per annum from the date of the payment of each of said premiums to the death of the insured" (R. 25).

The policy provides for the payment of the premiums at the home office of the Association in the city of Omaha, Nebraska, but prior to the time this policy was issued the Association had appointed one J. T. Cottingham as its local treasurer stationed at the city of Rogers in the State of Arkansas with authority to solicit insurance, collect premiums and deliver policies (R. 26).

In the application the following question and answer appear in line 16 on page 4 of the policy (R. 25).

"What is the premium? \$16.00 quarterly."

The proof shows conclusively that every quarterly premium paid was in the sum of \$16. The premium for the first year being the sum of \$74, if paid in equal quarterly installments the sums paid would necessarily have been \$18.50.

The receipt issued for the first quarterly payment was countersigned by the local treasurer for the Association and contains the following material recital:

"The Mutual Benefit Health and Accident Association in consideration of the payment of the premium due and subject to provisions of the policy held by insured and the statements and answers in the application signed by the insured, which the insured by the acceptance of this receipt repeats and declares to be true and agrees shall be the basis of his contract of insurance, does hereby continue in force the said policy from date hereof until twelve o'clock noon standard time July 1, 1927, at which time the next quarterly premium will be due. Yours truly, C. C. Criss. Counter-signed this 25th day of March, 1927.

"By: J. T. Cottingham, Local Treasurer" (R. 27).

Each subsequent receipt contains identical recitals excepting date and each was signed by Roy E. Hamilton, Local Treasurer, except the last one, which is signed by Harold R. Parker, Local Treasurer. The material recitals read as follows:

"The payment of this premium receipted for if made on or before date due keeps your policy in continuous effect and if paid after date due reinstates the policy on date of this receipt as provided in policy until twelve o'clock noon standard time. October 1,

1927, at which time another payment will be due" (R. 29-37 to 43).

At the trial the testimony showed that all premiums due on the policy had been paid and receipted for excepting the premium due on the 1st day of July, 1934 (R. 28).

The Association prior to July 1, 1927, appointed one Roy E. Hamilton to succeed Mr. Cottingham as its local treasurer at the said city of Rogers, who collected each and every premium due from the insured prior to the 1st day of April, 1934. The Association without notice to the insured changed its method of collecting premiums and required that same be paid to its local treasurer in the city of Little Rock, Arkansas. The petitioner, who acted as agent for the insured in the payment of all premiums, had been accustomed to make payment at the office of the local treasurer for a period of more than seven years and the local treasurer gave express consent to the payment of premiums out of time and on numerous occasions received payments of premiums after date same were due and payable (R. 28 and receipts R. 29-37 to 43).

When the premium came due on the 1st day of April, 1934, petitioner appeared at the local treasurer's office to make the payment. He was absent, but a girl child was present in the office who informed petitioner that the local treasurer was absent and suggested that the premium would have to be sent to Little Rock, Arkansas, and gave petitioner the name of the person to whom it could be sent but gave petitioner no information or intimation that Mr. Hamilton was no longer the local treasurer authorized to collect premiums. Petitioner sent the quarterly premium to

Little Rock and received a receipt for same but no notice that future premiums should be sent to Little Rock was given her (R. 29).

When the premium came due on the 1st day of July, 1934, petitioner appeared at the office of the local treasurer to pay the premium, but the office was closed and the local treasurer absent. Petitioner immediately set about to locate the local treasurer, but was unable to do so until the fifth day of the month at which time she found the local treasurer at his office and tendered him the premium. The local treasurer refused to receive the premium, saying: "Didn't you receive notice?" Petitioner replied that she had not received any notice. Then the local treasurer advised petitioner that the premium would have to be sent to Little Rock. Petitioner sent the premium to Little Rock by postal money order, but same was refused on the ground that payment was tendered out of time (R. 30).

The petitioner was the only witness in the trial. She identified the policy sued upon and same was introduced and received in evidence. She testified that all requirements of the policy had been met, and this is undisputed, except the matter of payment of premium for the first year in advance (R. 24).

Petitioner testified on direct examination that when the application for the insurance was made she was present; that the application was sent in to the company, and the policy was later delivered to the insured; that the premium for the first year in the sum of \$74 was paid in advance at the time the policy was delivered; that she per-

sonally paid a part of the first year's premium, and her husband paid the balance (R. 24-27).

On cross-examination by counsel for respondent, petitioner testified as follows:

"That the policy was purchased in Rogers, Arkansas; Mr. J. T. Cottingham took the application; he is now dead; that she paid a premium of \$74 for the first year, but did not get a receipt for the same; that Mr. Cottingham said the policy was a receipt. She made her next premium on the 1st of April, 1927. The policy was obtained on the 31st day of December, 1926.

"Q. Why was it, if you know, that you paid a quarterly premium on the 1st day of April, 1927, or just three months after you said that you had paid a premium for the entire year?

"A. Well, in order to keep my premiums up—because Mr. Cottingham said there was no days of grace included in the policy, but if we paid a year's premium in advance that would take the place of these days of grace" (R. 43).

After all the testimony was in, counsel for the defendant presented to the Court an oral motion to strike that part of petitioner's testimony relating to the payment of the first year's premium, as follows:

"Mr. Pryor: If the Court please, at this time we desire to move to strike the testimony of Mrs. Lyon regarding her testimony to the effect that she paid \$74 at the time this policy was applied for on the ground that it is not pleaded in the complaint and is not an issue that is raised by the pleadings in this Court" (R. 44-45).

The Court overruled the motion to strike and commented as follows:

"The Court: The motion will be overruled. The Court is of the opinion that the testimony is admissible. Her reason for the payment of this was brought out by the defendant's counsel. In the next place the Court is of the opinion that this question is raised and that he overruled the demurrer on the ground that she had paid—the allegation that she had paid the policy up past the date of July 1, 1934. This question was raised on demurrer. The Court at that time thought it was sufficiently alleged, and I still think it is sufficiently alleged, to cover that point. So your motion will be overruled and you may have your exception" (R. 45).

The material allegations of the complaint bearing on the question of payment of the premiums are as follows:

"That on December 31, 1926, the defendant issued and delivered to Wm. R. Lyon, plaintiff's deceased husband, a policy of life insurance, by the terms of which said defendant for and in consideration of the sum of \$74 premium for the first year *paid in advance* and the sum of \$64 annually thereafter payable in *quarterly* installments of \$16 each in advance, *beginning on the 1st day of April, 1927.* (Emphasis supplied)

"That on the 19th day of July, 1934, while said policy was in full force and effect, the said Wm. R. Lyon lost his life by accidental causes; that notwithstanding all dues and premiums *had been paid* on said policy and the insured and plaintiff had fully performed the conditions and re-

quirements of said policy and made due demand for payment, defendant has failed and now refuses to pay the sum due thereon. (Emphasis supplied)

"That the insured paid all premiums due thereon in the sum of \$464 and an additional sum of \$48; that the defendant was without right to claim or declare a forfeiture of said policy for nonpayment of said premium on said 1st day of July for the following reasons, to-wit:

"Third: That said premium had been previously paid and therefore was not due and payable on said 1st day of July, and the insured was not liable for payment of same at said time" (R. 12-13).

Counsel for respondent declining to offer any evidence, moved the Court to direct a verdict in favor of respondent as follows:

"That the policy terminated by its own terms on the 1st day of July, 1934, and that the defendant herein, as shown by the policy and as the evidence discloses, had the option to reject the premium payment and exercised that option; and on the further ground that the premium receipts, themselves, show that the policy terminated on the 1st day of July, 1934, prior to the time this loss occurred" (R. 47).

The motion was overruled. The Court upon its own motion directed the jury to return a verdict in favor of the plaintiff in the sum of \$3,678, and judgment was duly entered, to which action the defendant excepted and by appropriate steps appealed to the United States Circuit Court of Appeals for the 8th Circuit (R. 47).

Defendant's assignments of error material in the consideration of the case here are that the Court erred in overruling the defendant's demurrer to the complaint; in overruling the defendant's motion to strike testimony of the plaintiff with reference to the payment of the first year's premium in advance; in overruling the defendant's motion for an instructed verdict; in directing a verdict for the plaintiff (R. 49 to 53).

ABSTRACT OF CONCLUSIONS OF COURT OF APPEALS

The Circuit Court of Appeals held:

1. That the testimony of Mrs. Lyon tended to change and extend the insurance contract sued upon and therefore her testimony is incompetent (R. 65).
2. That the meaning of the words of the policy taken in connection with the application for the policy is that the insurance was payable in advance and that the rate was \$74 per annum for the first year and \$64 per annum thereafter; that the insured elected to pay for the insurance in payments of \$16 per quarter and that the date, April 1st, 1927, written into the form was the date upon which the first paid-up term expired and that the terms of the policy are a direct limitation upon the authority of any soliciting agent to bind the company by oral conversations outside of the written terms of the policy and application (R. 66).

3. The declaration of the application that the premium for the policy was \$16 quarterly taken with the provision of the clause (C) that payment of \$16 quarterly beginning April 1st, 1927, was required to keep the policy in effect, manifest the intent of the parties to contract for insurance on the quarterly payment plan (R. 66-67).
4. That the policy evidenced a contract of term insurance which the Association had a right to discontinue at any date when renewal was due.
5. That the term of insurance was ended prior to the accident (R. 67).

The findings and conclusions and reversal of the judgment amount to hold that petitioner cannot recover on the policy, and the trial court erred in directing a verdict for petitioner.

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

1st. In holding that the testimony of Mrs. Lyon relating to the payment of \$74 for the first year in advance is incompetent and therefore inadmissible.

2nd. In holding that the action of the local treasurer in collecting the \$74 for the first year in advance and consenting to premium payments out of time was in excess of his authority and therefore not binding on respondent.

3rd. In holding that under the terms of the contract the first year's premium was to be paid in quarterly installments of \$16.

4th. In holding that the policy contract is one of term insurance which respondent could lawfully discontinue at any premium paying date and therefore petitioner cannot recover on the contract.

5th. In holding that the District Court erred in directing a verdict for plaintiff, and in reversing the judgment of the District Court.

BRIEF AND ARGUMENT

SPECIFICATION OF ERROR No. 1

The Court of Appeals in holding the testimony of Mrs. Lyon incompetent upon the ground that it tended to change and extend the terms of the contract, in effect set up a new defense for respondent, one that was neither pleaded nor otherwise urged by respondent in either the trial court or the Court of Appeals.

If respondent desired to challenge competency of the testimony it was duty bound to object on specific grounds and thus afford the trial court opportunity to rule on the objection and to assign that ruling as error. This was not done, therefore respondent waived its right to challenge the testimony upon the ground that it tended to change and extend the contract.

Board of Com'rs of Kearney, Kan., v. Irvin, 126 Fed. 689.

Kruse v. Snyder, 87 Fed. (2nd) 723.

Lewis v. Standard Oil Co., 88 Fed. (2nd) 512.

Garrett v. Pope Motor Co., 168 Fed. 905.

Atlas Distilling Co. v. Rhenstrom, 86 Fed. 224.

Gallot v. U. S., 87 Fed. 446.

The rule that has been given general application is that, excepting cases showing extraordinary reasons for relaxation, there must be specific objection affording opportunity for the trial court to pass upon the question, an exception to the ruling, and the ruling must be assigned as error.

The exceptions to the rule are where the error complained of is patent on the record or there was an attempt to save an exception.

The rule is explained and applied in the following decisions of this court:

Brasfield v. U. S., 272 U. S. 448.

U. S. v. Atkinson, 297 U. S. 157.

N. Y. Central Ry. Co. v. Edward H. Johnson, 279 U. S. 310.

In the *Brasfield* case the proper relation between the court and jury was involved. By directing certain questions to the jury after submission of the case the trial court committed reversible error. The exception was not particularized, but it was there held that under the extraordinary circumstances involved this court was not precluded from correcting the error.

In the *N. Y. Central* case, *supra*, counsel for plaintiff made a bitter attack on counsel for defendant which was calculated to arouse prejudice in the minds of the jury. Defense counsel did not particularize exceptions, but it was held that this court was not precluded from correcting the error. The Court said: "the public interest requires that litigation be fairly and impartially conducted, and it is the duty of Courts to protect suitors in their rights to a verdict uninfluenced by the appeals of counsel to passion and prejudice."

It is significant that in the cases cited no waiver of rights was chargeable to the complaining party. There was, either error patent on the record, an attempt to save

exceptions, but in the case at bar the testimony was not objected to when offered, nor was there an attempt of any kind to challenge it upon the ground that it tended to change and extend the terms of the contract, which clearly amounted to a waiver of the right.

Counsel for respondent moved to strike the testimony upon the specific ground that it is not responsive to the issues raised by the pleadings, but the Court of Appeals passed the specific objection unnoticed and held the testimony incompetent upon the new and different ground that it tended to change and extend the terms of the written contract. This amounted to force the respondent into a position with reference to the admissibility of the testimony which it had shown no inclination to take, or disposition to defend, and injected into the case an issue which the trial court was given no opportunity to rule upon.

The respondent, even if disposed so to do, could not object to the testimony upon one specific ground in the trial court and challenge it, for the first time, upon a new and different ground, in the Court of Appeals.

Lehman v. Burnes National Bank, 20 Fed. (2nd) 897.

Lederer v. Real Estate Title Co., 273 Fed. 933.

The Court of Appeals evidently overlooked the fact that the testimony of Mrs. Lyon developed on direct examination was not objected to, and that Counsel for respondent, on cross-examination, developed substantially the same facts, and even went further to show the oral conversations between insured and the local treasurer,

therefore the Court of Appeals is in the attitude of reversing the judgment for admissibility of testimony which counsel for respondent brought into the record.

This case does not fall within the rule laid down in cases like *Watkins Salt Co. v. Mulkey*, 225 Fed. 739. In that case oral evidence tending to prove an oral contract was admitted without objection, but at the close of plaintiff's evidence defendant moved for directed verdict upon two grounds; First, that the oral agreement was merged in the written contract sued upon and, Second, that the oral agreement violated the statute of frauds. The Court held that a sufficient objection had been made, but in that case opportunity was afforded for the trial court to rule on the objection upon both grounds, but in this case the testimony was not challenged in any manner, either in the trial court or in the appeals court, upon the ground that it tended to change and extend the terms of the written contract.

Where the terms or words used in a policy of insurance are ambiguous parol evidence is admissible to explain them.

Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 527.

Continental Life Ins. Co. v. Chamberlain, 132 U. S. 302.

There is sufficient ambiguity in the provisions of the policy relating to premium payments to justify admission of parol evidence to explain them.

Delivery of the policy containing provision for payment in advance raises a rebuttable presumption that the

first premium was paid, but payment is always a question of fact that may be shown by parol evidence.

48 Corpus Juris 687.

Keen v. Aetna, 213 Fed. 893.

Lasker v. Morris, 131 Ark. 576.

Lay v. Gaines, 130 Ark. 167.

Kilpatrick v. Rowan, 119 Ark. 175.

J. H. McGill v. Lane, 90 Ark. 426.

Morton v. Morton, 82 Ark. 492.

Vaughn v. Taylor, 18 Ark. 65.

Pate v. Johnson, 15 Ark. 375.

SPECIFICATION OF ERROR No. 2

An admitted agent may be dealt with as a general agent in matters within the apparent scope of the agency, and the principal is bound by the acts of the agent, even though his acts are in excess of the authority given.

Oak Leaf Mill Co. v. Cooper, 103 Ark. 79.

Queen of Ark. Ins. Co. v. Malone, 111 Ark. 229.

Concordia Fire Inc. Co. v. Mitchell, 122 Ark. 357.

Hal H. Peel & Co. v. Hawkins, 175 Ark. 806.

Stipcich v. Insurance Co., 277 U. S. 311.

Payment of premium to a general agent of the company authorized to transact the company's business and without notice of any limitation of his authority to receive payment is sufficient to bind the company.

32 C. J., p. 1199.

Southern Life Ins. Co. v. McLain, 96 U. S. 84.

McNeily v. Continental Life Ins. Co., 66 N. Y. 23.

Mowry v. Home Life Ins. Co., 9 R. I. 346.

Payment to a general agent is sufficient whether in conformity with the terms of the policy or not.

Lasch v. N. Y. Life Ins. Co., 153 N. Y. S. 898.

The agency clause in a policy of insurance must be liberally construed.

Supreme Lodge K. of P. v. Withers, 177 U. S. 260.

In the case of *Peel & Co. v. Hawkins*, *supra*, the agent, acting without authority, agreed that the Insurance Company would make insured a loan out of which insured could pay his promissory note given for the first premium. That was a matter pertaining to the collection of premiums. The Company was also engaged in the business of making loans. The agent was authorized to collect premiums and under the law as declared by the Supreme Court of Arkansas he was a general agent for all purposes within the scope of his agency, and could bind his company notwithstanding he acted in excess of authority.

In the case at bar the agent was given the title of local treasurer and authorized to collect premiums. His actions here involved were related to the collection of premiums, and for that purpose he was a general agent, and had apparent authority to waive requirement of strict performance concerning time and manner of payment.

Respondent's local treasurer was not an ordinary soliciting agent. He had authority to solicit insurance, accept applications, collect initial premiums, deliver policies, collect renewal premiums and countersign receipts, in fact by giving him the title of local treasurer the respondent held him out, not only as a general agent, but as an agent having an official character with apparent authority to transact the company's business generally at Rogers, Arkansas.

Knowledge of limitation on agent's authority must be shown to be binding on insured.

N. Y. Life Ins. Co. v. Fletcher, 117 U. S. 519.

In the case at bar the insured had no actual or constructive knowledge of any limitation on the authority of the local treasurer. None was expressed in the application and the limitation expressed in the policy came too late.

Provisions in a policy limiting the agent's authority are not binding on insured during the preliminary negotiations.

Peoples Fire Ins. Co. v. Goyne, 79 Ark. 315.

Hartford Fire Ins. Co. v. Wilson, 187 U. S. 467.

Mutual Benefit Life Ins. Co. v. Robinson, 58 Fed. 723.

SPECIFICATION OF ERROR, No. 3

The Court of Appeals held that the contract provides for insurance on the quarterly payment plan, and therefore any change in the plan of payment would amount to a change and extension of the terms of the contract, and that

the local treasurer was without authority to bind the company with such a change.

It is obvious that in reaching that conclusion the Court failed to give due effect to the well-settled rule that requires a construction of the terms of the policy most liberally in favor of the insured, and that in case of conflict or ambiguity a construction will not be adopted that will defeat recovery if it is susceptible of a meaning that will permit one.

Industrial Mutual Ins. Co. v. Hawkins, 94 Ark. 419.

Hastings Industrial Co. v. Copeland, 114 Ark. 415.

Irwin v. Nichols, 87 Ark. 97.

United Order of Good Samaritans v. Grigsby, 180 Ark. 610.

National Bank v. Ins. Co., 95 U. S. 673.

During the preliminary negotiations insured learned that no days of grace were allowed for payment of premiums. The local treasurer suggested a plan of payment so as to keep the premiums paid a year in advance. That plan was adopted and the respondent ratified the oral agreement by issuing the policy so as to reflect it. The policy in plain terms provides for payment of the first year's premium in the sum of \$74 in advance, and the quarterly premium payments were to begin on April 1st, 1927, so as to keep the premiums paid a year in advance. If the first year's premium was to be paid in equal quarterly installments as held by the Court of Appeals, then the payments during the first year would necessarily have been in the sum of \$18.50 instead of \$16. It is plainly evident that this

feature of the evidence was entirely overlooked by that Court.

In the application there is a question and answer indicating that the premiums were to be \$16 quarterly, but that relates to subsequent annual premiums to be paid in quarterly installments and not to the premium for the first year. Provisions for the payment of renewal premiums are not applicable to the payment of the first premium.

McMaster v. New York Life Ins. Co., 183 U. S. 25.

It may be conceded that the application and policy considered together form the contract of insurance, but where there is conflict the policy provisions prevail and control.

Mouler v. American Life Ins. Co., 111 U. S. 335.

When the evidence is carefully considered and the policy terms construed liberally in favor of recovery, it cannot be said that the local treasurer exceeded his apparent authority, in fact there is a total absence of reason for holding that he exceeded his actual authority, but if he did that his action was fully ratified by respondent.

The facts here are quite different to the facts in the case of *Sadler v. Fireman Fund Ins. Co.*, 185 Ark. 480. That case involved the authority of a soliciting agent to agree upon terms to be inserted in the policy, and it was held that a soliciting agent did not have authority to make insurance contracts binding on the principal. The Court in that case simply held in effect that the making of a contract of insurance is not within the apparent scope of agency of a mere soliciting agent.

In clause (C) on page 3 of the policy (R. 25) appears the following provision:


"If any such dues be unpaid at the office of the Association in Omaha, Nebraska, this policy shall terminate on the day such payment is due."

This is the only provision in the policy attempting to fix the time and place of payment of premiums. Insured paid the premiums to the local treasurer at Rogers, Arkansas, continuously for more than seven years. The majority of the payments were made on the due date, but several were paid prior to, and some after the date payment was due, but none were paid in the manner required by the terms of the policy. The local treasurer gave express consent to payment of premiums out of time. Every premium tendered, excepting the last one, was accepted by the association without objection. This was clearly a waiver of the policy requirement as to time and place of premium payments, indeed, it was a complete abandonment of it.

As shown by authorities herein above cited the local treasurer was a general agent for all purposes relating to collection of premiums and therefore had apparent authority to waive strict compliance with the requirements concerning premium payments, notwithstanding the provision in the policy tending to limit his authority.

Having established the agency with authority to collect the premiums, and maintained the agency for that purpose for a period of more than seven years, a termination of it without notice was not binding on the insured.

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Burlington Ins. Co. v. Threlkeld, 60 Ark. 539.

Southern Life Ins. Co. v. McCain, 96 U. S. 84.

State Life Ins. Co. v. Murray, 159 Fed. 408.

The termination of the agency without notice was the sole cause of insured's delay in paying the premium which came due on July 1, 1934. Regardless of the fact that the premiums were paid a year in advance the terms of the policy required payment of a premium at the beginning of each quarter. Insured made an effort in good faith to make the payment when due.

SPECIFICATION OF ERROR No. 4

Where two clauses of a contract of insurance conflict and are inconsistent, they must be construed as to give effect to the true intent of the parties, as collected from the whole instrument. If one clause is at variance with another the one contributing most essentially to the contract will be entitled to more consideration than that which contributes less. The clause which essentially requires something to be done to effect the general purpose of the contract itself is entitled to greater consideration than the other.

Fidelity & Casualty Co. v. Meyer, 106 Ark. 91.

United Order of Good Samaritans v. Grigsby, 180 Ark. 610.

Industrial Mutual Ins. Co. v. Hawkins, 94 Ark. 419.

Life & Casualty Ins. Co. of Tenn. v. Ford, 172 Ark. 1098.

Peiffer v. Mo. State Life Ins. Co., 174 Ark. 783.

Hastings Industrial Co. v. Copeland, 114 Ark. 415.

Irwin v. Nichols, 87 Ark. 97.

National Bank v. Ins. Co., 95 U. S. 673.

Mutual Ins. Co. v. Herni Co., 263 U. S. 167.

Great Lakes Corp. v. Interstate S. S. Co., 301 U. S. 646.

The provisions of clauses (C) and (D) on page 3 of the policy (R. 25) if construed separately and independently of other provisions appear to authorize arbitrary termination of the contract by the Association at any premium paying date. If so construed, they are in conflict, not only with part "C" on page one of the policy which provides for annual increase of benefits and the twenty-year privilege, but also with the general import, purpose and intent of the contract.

Where a policy contains provisions that impress it with the essential character of lifetime insurance as does the one here involved; offers attractive rewards for continuous performance; enables insured, by continuous performance, to build up a one hundred per cent increase of benefits which after payment of twenty annual premiums he may carry for only \$4 annually; provides for additional payment of a sum equal to all premiums paid with compound interest, an extraordinary saving and investment feature, all of which is lost if the policy is terminated; a receipt is issued for each premium payment, reciting not that the policy will terminate, or have to be renewed, at the next premium date, but that on that date another premium payment will be due, reason and justice would seem to compel a construction allowing such provisions to prevail over a conflicting provision that would under strict

construction authorize an arbitrary termination of the contract, and thus deprive insured of his earned benefits.

Under the rule that obtains in Arkansas every policy of insurance is to be construed liberally in favor of insured and as the language employed is that of the insurer a construction will not be adopted which will defeat recovery, if it is susceptible of a meaning that will permit one.

In the case of *Industrial Mutual Ins. Co. v. Hawkins*, above cited, the policy contained the following provision:

"If the insured receives an injury which shall independently of all other causes, immediately and wholly disable and prevent the insured from the prosecution of any and every kind of business for a period of not more than one week * * *"

The court adhering to the well-established rule, that the terms of the policy must be construed liberally in favor of the insured, and so as not to defeat the purpose of the contract, held that the words used mean, "any and every kind of work pertaining to his occupation or within the scope of his ability."

The insured was an uneducated day laborer and incapable of performing any kind of work or business except day labor. If the policy had been strictly construed recovery would have been defeated because, notwithstanding insured's injury incapacitated him from performing work as a day laborer, he could, if qualified, have engaged in a business or occupation which did not require physical labor.

In the case of *United Order of Good Samaritans v. Grigsby, supra*, there were conflicting provisions in the contract involved. One provided that if dues are not paid

by the tenth day of each month the insured shall be automatically suspended, and the insurer shall not be liable on the contract, but in another provision the dues are made payable in advance, on or before the first day of the month with ten days grace, which made dues fall due on or before the eleventh day of the month. The dues were paid on the eleventh day of the month, but the insurer contended that inasmuch as same were not paid on or before the tenth day of the month the insured was automatically suspended. The court adopted the construction most favorable to insured and sustained the right of recovery.

In the case of *Life and Casualty Insurance Company of Tennessee* above cited, the policy provided for indemnity for loss of one limb in the sum of \$500 and for the loss of two limbs the sum of \$1,000. The policy contained the following provision limiting liability:

"No indemnity will be paid as result of, or for injuries caused by other means or under other conditions than those set forth above nor where death, or loss of members, or eye sight occur within thirty days from the date of accident."

The court giving to the policy a construction most strongly against the insurer held that by use of the word "members" the limitation applies only in case of loss of more than one member and therefore did not apply in that case, because the insured suffered loss of only one member.

In the very recent case of *Great Lakes Corporation v. Interstate Steamship Company, supra*, it was said by this Court:

"If ambiguities are raised by other clauses they must be resolved so as still to give effect to the dominant purpose which the policy clearly reveals."

There can be no reasonable doubt that both the Association and the insured understood and intended that the policy here involved should be a contract of lifetime insurance. It is plainly contemplated that premiums will be continuously paid at the stipulated rate until twenty annual premiums have been paid, then the insurance in the sum of \$4,000 which includes the annual increase of death benefits, may be carried for the nominal sum of four dollars a year.

The Court's especial attention is directed to section three of the STANDARD PROVISIONS on page two of the policy which reads as follows:

"If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of the premium by the association or any of its duly authorized agents shall reinstate the policy, but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance."

When properly construed this is not a policy of term insurance, no definite time is fixed for termination of the policy. It is true that clause (d) on page three of the policy provides that the term of the policy begins at twelve o'clock noon on the date of issue, and ends at twelve o'clock noon on the date any renewal is due, but when read in connection with other provisions of the policy which characterize the contract as one of lifetime insurance that clause

early means that the policy will terminate only if the renewal premium is not paid.

A policy of life insurance is ordinarily a contract for life and not one from year to year or only during the period for which a premium is paid.

Burnet v. Wells, 289 U. S. 679.

N. Y. L. Ins. Co. v. Stratham, 93 U. S. 30.

This policy is unlike the one involved in the case of *Rosenplanter v. Provident Savings Life Ins., Asso.*, 96 Fed. 1, in that case, while the policy contained some provisions similar to provisions in the policy here involved the distinguishing provision that makes it a term policy reads follows:

"In consideration of the premium paid and stipulated to be paid the insurance society agrees to pay the beneficiary the sum of the insurance Provided such death shall occur before twelve o'clock on the first day of April, 1890."

The policy involved here is clearly a contract of life insurance. That was obviously the understanding of both the association and the insured. That such was the understanding of the association is demonstrated by the fact that each receipt issued for premium payment recited, not that the policy would terminate, or have to be renewed, at the next premium paying date, but on that date another quarterly payment is due, and that such payment keeps the policy in continuous effect.

The continuous issuance of receipts containing such recital was positive assurance to the insured that by punctual payment of the premiums, the policy would be kept in

continuous effect, indeed, it was an implied agreement to that effect.

To construe it otherwise is to give approval to deception and to make the contract a snare by which the association may entrap a policyholder and beguile him into paying the premiums, while a desirable risk for the association, believing he will receive the increased benefits promised, but only to be disappointed by having his contract arbitrarily canceled out when the association desires to appropriate the accumulated benefits earned and avoid further liability on the contract.

It is a bad time for the Association to insist on a technical and strained construction of the ambiguous policy terms after the insured has paid the premiums punctually over a period of more than seven years and died believing he had made provision for the protection of his dependent family.

The courts will not construe an insurance contract so as to give effect to deception.

Phoenix Ins. Co. v. Slaughter, 12 Wallace 404—
30 Law ed. 444.

The law abhors a forfeiture, therefore the courts are prompt to seize hold of any circumstances that indicate an election to waive a forfeiture. Any agreement, declaration or course of action on the part of an insurance company which leads an insured person honestly to believe that, by conformity thereto a forfeiture of his policy will not be incurred, and followed by due conformity on his part, will and ought to estop the company from insisting upon a for-

feiture, though it might be claimed on the strict letter of the contract.

In construing the policy the court will consider every provision, phrase and word in connection with each other and where there is no material conflict in the various clauses or inconsistent, contradictory or ambiguous terms, phrases and words used, effect must be given to each according to its ordinary and generally accepted meaning, but construction always means ascertainment of the real intent of the parties.

Grammatical construction must yield to that construction of provisions, words and phrases that tend to reflect the true intent of the contracting parties.

Punctuation, or the lack of it, is often a material factor in determining the true meaning of the various clauses in a contract, especially when there is apparent conflict.

In construing a contract it is permissible to transpose words if to do so will clarify the meaning of them and reflect the true meaning intended by the parties.

13 C. J., Pages 520 to 536, Sections 481-495, Incl.

The special and extraordinary benefits provided were obviously intended as an inducement to continuation of the contractual relationship. The court will not give to the contract a strained construction that will enable the defendant to arbitrarily terminate it, and thus deprive the beneficiary of the benefits earned.

In the last paragraph of clause (c) on page three of the policy the following provision appears:

"The acceptance of any premium on this policy shall be optional with the association and should the premium provided for herein be insufficient to meet the requirements of this policy, the association may call for the difference as required."

What is the true meaning of these provisions as collected from the whole contract? It seems absurd to argue that the company and the insured agreed and intended that any provision in this policy, offering the attractive earning features that it does, should mean that the company could arbitrarily cancel it at any time it might desire to avoid payment of the increased benefits earned, and its obligation to carry the liability at the reduced rate of premium.

It is here insisted that the true meaning of the first provision of clause "C" is that, if the premium is not paid on the day it is due, the policy will lapse and insured will forfeit his insurance, but if the premium is paid or tendered the policy will continue in force. The second provision, when read in connection with other provisions simply means that inasmuch as the defendant company is a mutual association, and each policyholder participates in the earnings of the association on the basis of graduated increase of benefits accruing only to those who continue their policies in force, and that its ability to pay such benefits is dependent upon maintenance of adequate premium rates, it may accept the premium tendered, if insufficient, and call for any balance that may be assessed against the policyholder.

By application of the above stated recognized rules of construction, the words in the second provision of clause

"C" may be transposed so as to express the true intent of the contracting parties, and by transposition it should be made to read as follows:

"Should the premium provided for herein be insufficient to meet the requirements of this policy, the acceptance of any premium shall be optional with the association, and the association may call for the difference as required."

Use of the co-ordinating conjunctive word "and", which follows the word "association" and precedes the word "should" in the second provision of clause "C" makes it a single declarative sentence and necessarily gives to the proviso the meaning contended for here. If the meaning contended for by Respondent had been intended, a period punctuation mark would have been used instead of the conjunction as was done in the provision of the policy involved in the case of *Yett v. Orgeon Casualty Co.*, 172 Pac 486, which will be cited by respondent. That case is not controlling here, because the provision there differs materially, and there was no effort made to pay the premium when due, and no waiver or estoppel relied upon.

The provision here under test is a simple reservation of the right to demand of its member's payment of an adequate premium rate when an increase of such premiums appears necessary to enable it to meet benefit liabilities, and to provide that acceptance of a premium does not estop or debar it from demanding additional premium payments when necessary. Any other construction of the provision will tend to defeat the real intent of the parties to the contract and enable the defendant company to arbitrarily deprive its policyholders of the increased benefits.

As stated in a former brief filed herein:

Under the construction given this policy by the Appeals Court it was permissible for respondent to receive premium payments for the full twenty-year period, then discontinue the contract to avoid carrying the liability at the reduced premium rate. Such a construction is condemned by its own injustice. The conclusion that this policy was intended by the parties to be lifetime insurance is inescapable and when construed so as to effectuate that intent it provides for termination by respondent only for breach by the insured.

The respondent is a mutual association. Notice of the annual meeting is printed in clause "f" of general provisions on page thirty of the policy. Dividends are not distributed direct to the policyholders, but it is contemplated that they will participate in the earnings on basis of annual increase of benefits and return of premiums with interest added.

It may be fairly assumed that premium rates are fixed to provide for payment of the increase of benefits. By payment of the initial premium insured's rights are limited to protection in the sum of \$2,000 for the first year but by payment of renewal premiums he acquired a vested right to participate in the earnings of the Association on basis of increased benefits. To hold otherwise is to nullify the contractual obligation of respondent to give effect to the provisions for rights and benefits to be earned by continuous payment of the premiums.

SPECIFICATION OF ERROR No. 5

The trial court did not err in directing a verdict for the petitioner.

It is the rule of universal application that where the testimony is undisputed and from it all reasonable minds must draw the same conclusion of fact, it is the duty of the court to declare as a matter of law the conclusion to be reached, but where there is substantial evidence to support the verdict the question must be submitted to the jury.

Smith v. McEachin, 186 Ark. 1134.

The testimony of the plaintiff that the first year's premium in the sum of \$74 was paid in advance is undisputed. Of course, she is an interested witness, but if it be conceded that the rule in *Blankenship v. Modglin*, 177 Ark. 38, holding that the positive testimony of an interested witness standing alone will not be treated as undisputed, that rule is not controlling here for the reason that Mrs. Lyon's testimony is not standing alone. It is corroborated and made conclusive by the following facts and circumstances:

- 1st The policy provides in plain terms that the premium for the first year in the sum of \$74 is to be paid in advance.
- 2nd The premium for the first year is not required to be paid in quarterly installments. The provision for quarterly payments applies only to subsequent premium payments made to keep the policy in continuous effect.
- 3rd If the premium for the first year was required to be, or was, paid in quarterly installments, the

amount would necessarily have been \$18.50 per quarter instead of \$16.

4th The delivery of the policy with the provision for the payment of the first year's premium in advance is *prima facie* evidence that the first premium was paid.

5th The recital in the policy that it is issued in consideration of the statements made in the application and the payment of the premium of \$74 for the first year in advance, is to all intents and purposes an acknowledgment of the payment of that amount.

In testing whether or not there is any substantial evidence in a given case the evidence and all reasonable inferences deducible there from should be viewed in the light most favorable to the party against whom the verdict is directed, and if there is any conflict in the evidence or where the evidence is not in dispute, but is in such a state that fair-minded men might draw different conclusions therefrom it is error to direct a verdict.

Smith v. McEachin, supra.

In the state of Arkansas the scintilla rule is applied.

Home Life Ins. Co. v. Miller, 182 Ark. 901.

Inasmuch as the action of a court in directing a verdict is procedural it is here assumed that the *lex fori* applies in the federal courts.

The scintilla rule does not apply in federal courts. It has been disapproved.

Elliott v. C. M. & St. P. R. Co., 150 U. S. 245.

Small v. Lamborn Co., 267 U. S. 254.

In *Small v. Lamborn* last above cited this court laid down the rule that governs in the matter of directing verdict as follows:

"The rule for testing the direction of a verdict is that where the evidence is undisputed or of such conclusive character that if a verdict were returned for one party, whether plaintiff or defendant, it would have to be set aside in the exercise of sound judicial disgression, a verdict may and should be directed for the other party."

And continuing the court went on to say:

"The view that a scintilla or modicum of conflicting evidence irrespective of the character and measure of that to which it is opposed, necessarily requires a submission to the jury has met with express disapproval in this jurisdiction as in many others."

If the trial court had submitted this case to the jury the only fact or circumstance respondent could have relied upon is that petitioner did not exhibit a receipt showing payment for the first premium, and in urging that fact it would have been confronted with the positive and undisputed testimony of the plaintiff, brought out by counsel for respondent on cross-examination, that the reason why she did not have a receipt was because Mr. Cottingham, respondent's authorized local treasurer, advised insured that the policy itself is a receipt for the first premium payment.

Delivery of the policy containing provision requiring premium for the first year to be paid in advance is *prima facie* evidence that the premium was paid as required.

32 C. J., p. 1204, Sec. 335.

Mutual Reserve L. Ins. Assoc. v. Heidel, 161 Fed. 535.

Mass. Benefit L. Ins. Co. v. Sibley, 158 Ill. 411.

Globe Mutual L. Ins. Co. v. Meyer, 118 Ill. A. 155.

Union Life Ins. Co. v. Parker, 66 Neb. 395.

It appears that the court of appeals erroneously resolved every possible doubt against Petitioner's right of recovery and indulged every presumption against correctness of the judgment of the trial court.

It is here insisted that the judgment of the trial court is correct, and that the judgment of the U. S. District Court should be affirmed, and that all other appropriate relief should be awarded to the petitioner.

Respectfully submitted,

JOHN W. NANCE,

Attorney for Petitioner.



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CHARLES ELMORE CROPLEY
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In the Supreme Court of the United States

OCTOBER TERM 1938

MRS. ZILLAH LYON **Petitioner**

vs.

No. 189.

MUTUAL BENEFIT HEALTH &
ACCIDENT ASSOCIATION **Respondent**

RESPONSE TO PETITION FOR WRIT OF CERTIORARI /
AND BRIEF IN SUPPORT THEREOF.

✓ **THOMAS B. PRYOR,**
Counsel for Respondent.

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In the Supreme Court of the United States

OCTOBER TERM 1933.

MRS. ZILLAH LYON **Petitioner**

vs.

No. 189.

**MUTUAL BENEFIT HEALTH &
ACCIDENT ASSOCIATION** **Respondent**

RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

PRELIMINARY STATEMENT

The complaint upon which this case was tried sets out at length that the petitioner failed to pay a premium upon policy due July 1st, 1934, and pleads what she claims are facts excusing and justifying that failure and which she claims would prevent the petitioner from "declaring a forfeiture." The policy is a term policy and not a life policy that can be terminated only for failure to pay premiums. The policy specifically reserves to the company the right to terminate the policy on any premium paying date by refusing to accept the premium.

The respondent filed a demurrer which was overruled, and at the time of the trial it developed for the first time that the petitioner claimed to have paid, at the time the policy was delivered \$74.00, so as to keep the policy always paid up a year in advance.

At page 10 of the petition counsel set out what he says are the material allegations of the complaint with reference to the payment of premiums. The first of those allegations is that the policy was issued under the terms of payment as set out in clause "C" of the additional provisions of the policy and does not in itself contain any information that the plaintiff intended to claim that \$74.00 was paid in addition to the sum required to be paid to keep the policy in force until the first day of April, 1927, which was the date specified in the policy for the beginning of quarterly renewals.

The next allegation is a conclusion that all of the dues and assessments had been paid, which counsel for respondent, as it had a right to, took to be based upon the specific facts alleged.

The third allegation, which in the complaint is separated from the other allegations by several hundred words, alleges that the premiums actually paid amounted to \$464.00 (which is the total sum of the twenty-nine quarterly premium payments), and an additional sum of \$48.00, which is not alleged to be premiums. Furthermore, at page 10 of counsel's petition he does not set out the full paragraph and inserts after the semi-colon words that are located some nine hundred words later in the complaint. Petitioner seeks to recover under the provisions of the policy the \$464.00 in premiums with four per cent interest, does not seek to recover the \$48.00, which she would be entitled to if it were a premium. (R. 13). The last half of the allegation which begins at the bottom of page 10

of counsel's brief and extends to page 11 is found at page 15 of the record following the detailed allegations of excuse or failure to pay the premium due on July 1st, 1934, and constitute no more than a conclusion that under these facts the premium should be considered in law as paid.

At the trial petitioner abandoned the effort to establish liability on the basis of the excuses alleged in the complaint for failure to pay the July 1st, 1934 premium, and relied instead upon her testimony that at the time the policy was delivered to her husband, the assured, \$74.00 was paid to the agent for the purpose of taking the place of days of grace, since the policy had no provision for extension of time to pay premiums. Respondent moved to strike this testimony as not responsive to the issues made by the pleadings, which motion was overruled. Then the respondent moved for a continuance on the grounds of surprise and that if a continuance was granted would show that \$74.00 was never paid or received by the company, and offered to show by witnesses that neither petitioner nor counsel had ever claimed or even intimated previous to the trial that \$74.00 or any other sum had been paid.

Petitioner introduced the policy and the premium receipts. The policy specifically provides the date upon which the first quarterly premium shall be paid and the premium receipts each specifically state the date the insurance expires, and the application states that premiums are payable \$16.00 quarterly. The petitioner had each of the twenty-nine premium receipts excepting two and for

-4-

these two she had cancelled checks showing payment. She did not have any memorandum of any kind as to payment of the \$74.00, which she claimed was made to an agent of the company who was dead at the time the suit was filed.

Respondent then moved for a directed verdict upon the grounds, *first*, that the policy terminated by its own terms on the first day of July, 1934, *second*, that the policy contained an option in favor of the company to reject any premium payment and that that option was exercised when the premium was tendered on July 6th, 1934, *third*, that the premium receipts themselves, offered by the defendant, show that the policy terminated on the 1st day of July, 1934, which was admittedly prior to the date of the loss. The Court upon his own motion then instructed a verdict in favor of the plaintiff.

At page 11 of petitioner's brief the assignments of error which he says are material are that the Court erred in overruling the motion to strike the testimony with reference to the payment of \$74.00, in overruling of defendant's motion for an instructed verdict, and in directing a verdict for the plaintiff. An additional assignment is No. 7 that "the Court erred in entering judgment on the verdict, as there is no substantial evidence to sustain the verdict." (R. 52).

At page 4 of counsel's petitioner he purports to set out a clause of the policy, being clause "C" at page 3 of the policy. We call the Court's attention to the fact that the clause itself is not in two sentences as would appear

from this quotation, but is one complete sentence, and when read as such does not support the statement interposed between its parts.

SUMMARY OF ARGUMENT

Point A.

THE ALLEGED CONFLICT IS ON PROCEDURAL MATTERS ONLY, AND THERE IS NO SHOWING THAT THE PROCEDURE OF RESPONDENT IN APPEAL TO THE COURT OF APPEALS IS INSUFFICIENT.

Point B.

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE COURT OF APPEALS IN THIS CASE AND THE LAWS AND DECISIONS OF ARKANSAS AND NO SHOWING IS MADE TO ENTITLE PETITIONER TO ISSUANCE OF THE WRIT.

1. Mrs. Lyon's testimony was incompetent—a soliciting agent cannot vary the terms of a policy after application is made and policy issued.
2. The policy was term insurance and no citations hold the contrary.
3. Petitioner's testimony not conclusive.

BRIEF AND ARGUMENT

Point A.

Petitioner alleges as a ground for the issuance of the writ that each holding of the Circuit Court of Appeals is in conflict with the decisions of the Arkansas Supreme Court and that the decision of the Circuit Court of Appeals is in conflict with decisions of other Circuit Courts of Appeal. The first specification of error deals with the alleged conflict between Circuits.

It will be noted that it is not claimed that the conflict is in substantive law but in rules of procedure, and we do not understand that under the rules of this Court such a conflict will be reviewed, especially in view of the fact that the rules of procedure in the different Circuit Courts of Appeal are not uniform.

However, counsel for appellee have not cited any cases in point on this question. In the first case cited, the Board of Commissioners of Kearney, *Kansas v. Irvin*, 126 Fed. 688, no exception of any kind was saved, and in all the other citations various courts held that the assignment of error was too general and indefinite, while in the case at bar specific objection was made to the testimony was challenged, proper exceptions saved and an assignment of error caused thereon. The opinion of the Court of Appeals does not suggest that the assignment of errors was insufficient, too general or too indefinite.

Furthermore, it is within the power of the Court to notice error if it should so desire. In the case of Dela-

ware & H. R. Corporation v. Cottrell, 69 Fed. (2d) 195, it is held:

"Failure seasonably and specifically to except at the trial is fatal unless this Court on its own motion disposed to review the error so assigned."

Counsel also overlooked the motion for directed verdict, which raises every question decided and discussed by the Court of Appeals.

Point B.

ALLEGED CONFLICTS WITH DECISIONS OF THE SUPREME COURT OF ARKANSAS:

I

Reason No. I for the issuance of the writ states that the policy was applied for and delivered in Arkansas and that it is an Arkansas contract governed by the state laws. This is true under the decision of this Court in *Erie v. Tompkins*. However, it is necessary that petitioner show this Court a conflict which might result in a different conclusion before she would be entitled to have certiorari granted.

This Court said in the case of *Ruhlin v. New York Life Insurance Company*, 82 L. Ed. 823, decided by this Court May 2nd, 1938:

"A different case might have been presented and the facts and authorities developed in another fashion if the parties had had in mind from the first the rule of the Pennsylvania Court would be applied."

In the case at bar petitioner has wholly failed to show that there might have been any different result had

any Arkansas decision been applied. In other words, a mere claim that the decision is in conflict with local law without any showing of conflict or that there is some possibility that a reconsideration of the case in the light of state law would affect the decision, is insufficient.

As stated, Reason No. I contains only a bald assertion that each holding of the Circuit Court of Appeals is in conflict with the decision of the state law. In subsequent numbered paragraphs petitioner sets out the specific holdings which he says are in conflict with state law, and we will consider each one separately and show that no conflict has been established.

II.

Petitioner's brief says:

"The holding that the testimony of Mrs. Lyon is incompetent and the local Treasurer's action in receiving the first year's premium in advance was unauthorized is in conflict with the following decisions of the Supreme Court of Arkansas. * * *"

Counsel have misinterpreted the opinion of the Court below, for that Court did not hold that

"the local Treasurer's action in receiving the first year's premium in advance was unauthorized * * *"

but held that the local Treasurer had no power to alter the terms of an insurance policy after an application had been made and the policy issued.

The case of Queen of Arkansas Insurance Company v. Malone, 111 Ark. 229, and the case of Concordia Fire

— 9 —

Insurance Company v. Mitchell, 122 Ark. 357, cited by petitioner, hold that a soliciting agent had the power to waive proof of loss. There is quite a difference between the power of an agent to waive proofs of loss and the power to make unusual terms of a policy. No proofs are involved in this case and the cases cited have no application whatsoever.

The case of Caldwell v. Fitzhugh, 175 Ark. 806, cited by counsel, was a case where an insurance company was engaged in the business of writing insurance and in making loans and had an agent empowered to make loans, and since he was generally empowered to do so, his agreement was binding upon the company. There is no suggestion in this case that the deceased's local Treasurer at the time the policy was delivered had any power to change or vary the terms of the policy, and no case is cited by petitioner where the Supreme Court of Arkansas has so held. On the contrary, the decision of the Court of Appeals is in conformity with the decisions of the Supreme Court of Arkansas, one of the recent decisions being the case of Sadler v. Firemen's Fund Insurance Company, 185 Ark. 480. In that case the Court said:

"A soliciting agent has no authority to agree upon terms to be inserted in policies or to change or modify or waive terms contained therein." (Citing cases).

These cases could be multiplied but we cite this one to show that counsel has failed to apply the proper decisions of the State Court in view of the holding of the Court⁶ of Appeals.

The case of California Insurance Company v. Union Compress Company, 133 U.S. 418, cited by counsel, has no bearing on the case at bar that we have been able to find. The case of Home Insurance Company v. Baltimore Warehouse Company, 93 U.S. 542, also deals with waiver of proof of loss. The case of McMaster v. New York Life Insurance Company, 183 U.S. 25 is not in point, but the facts there were that an agent inserted in the application a provision as to the date the policy should bear contrary to the agreement made by the agent with the assured. The holding of this Court was that the assured was not bound by the act of the agent. The agent was not authorized by the assured to insert the provision.

It will be noted in the McMaster case supra the Court stated that the case involved the statutes of Iowa.

There is no conflict in the decisions of this Court and the decision of the Court of Appeals in the case at bar, and as stated by counsel for appellee, the controlling decisions are the decisions of the Supreme Court of Arkansas.

The case of Life & Casualty Insurance Company of Tennessee v. Ford, 172 Ark. 1068 is cited, which holds that ambiguous provisions of an insurance policy should be resolved against the company. This is correct law both in the State Courts and in the Federal Courts, but the Court of Appeals in this case found no ambiguity and the citation has no application to this case.

The case of Hartford Life Insurance Company v. Wil-

son, 187 U.S. 467, is cited at page 23 of petitioner's brief. The holding of that case was that where the agent doubted his authority to write a policy of fire insurance, but did write it upon condition that it be accepted by the company before becoming effective, the accidental delivery of the policy after rejection by the company did not render it effective to cover a loss sustained. This case has no application to the question before this Court.

The case of Mutual Benefit Life Insurance Company v. Robinson, 58 Fed. 723, is not in point as it deals solely with the powers of agents in taking applications and it is not contended in this case that the agreement to pay and accept a year's premium in advance was made at the time the application was taken but is claimed to have been made at a subsequent time when the policy had been issued and was delivered. The headnote in that case states:

"A provision in a life insurance policy withholding from the agents authority 'to make, alter or discharge this or any other contract in relation to the matter of this insurance' does not limit the powers of the insurer's agents in preparing and accepting an application for insurance."

The case of Peoples Fire Insurance Association v. Gonis, 79 Ark. 315, 16 L.R.A. (N.S.) 1180, has no bearing upon the case at bar. In that case an agent inserted answers in the application and it was held that the company was estopped to question the truth of the answers. This case does not involve the application or the truth of the answers therein, but as above pointed out, the

application was made prior to the alleged agreement to pay a year's premium in advance.

Counsel states:

"Provisions for payment of renewal premiums are separate and not attached to payment of first premium."

The case of *McMaster v. New York Life Ins. Co.*, *supra*, is cited. We find no connection between the case cited and the statement made, but in any event no citation from the Arkansas Supreme Court is made. The Court of Appeals stated the questions involved in this case as follows:

" . . . that there was no competent or substantial evidence to sustain plaintiff's allegations that the insured had paid all of the premiums and kept the policy in force and effect at the time of the death." (R. 63).

The other question determined by the Court of Appeals as shown by the opinion (R. 63) was that the insurance involved was term insurance only and that the acceptance of any premium was optional with the association; which option was exercised and the premium due on July 1st, 1934, was rejected and the policy terminated nineteen days before the death of the assured.

We call the Court's attention to the concluding paragraph of the opinion (R. 66-67):

"The declaration of the application that the premium for the policy was \$16.00 quarterly, taken with the provision of Clause (C) that payment of \$16.00 quarterly, beginning with April 1st, 1927, was

required to keep the policy in effect and with the statement in the application that the premium was payable quarterly, manifests the intent of the parties to contract for insurance on the quarterly payment plan. The insured began making quarterly payments of \$16.00 immediately before the date April 1st, 1927, and kept them up each quarter for years and that is what the parties meant and intended should be done.

On page 21 of petitioner's brief it is stated:

"It is not uncommon for a policy holder to deposit funds with the insurance company to meet premium payments subsequently coming due."

There is no testimony in the record upon which to base this statement, either as to this company or other companies generally, and as a matter of fact it is uncommon and not tolerated at all by the respondent.

Counsel also argues that the terms of the policy require the payment in advance of \$74.00 and that the policy when issued was, under these terms, paid a year in advance. The opinion of the Court of Appeals (R. 66) disposed of this contention by saying:

"On casual inspection the reference in the clause to the 'payment in advance of \$74.00' might seem to imply an acknowledgment by the association that it had received a payment in advance for a year in the said sum of \$74.00 but more careful consideration of the contract convinces that the association did not intend to, and did not declare or acknowledge anywhere in the writing that it had actually received such sum or that it had received a year's premium."

Counsel cites no case from Arkansas or from any other jurisdiction contrary to this holding.

Furthermore, the option reserved in the policy to terminate the contract at any premium paying period could be exercised notwithstanding such a deposit if it had in truth actually been made. On this point counsel has failed to show any conflict with the Arkansas law or that there might be any different conclusion reached by the Court of Appeals upon a reconsideration of the case.

III.

Petitioner's third reason for the allowance of the writ seems to be that the holding of the Court of Appeals that the policy was a term insurance contract and not assimilated to life insurance is contrary to the decisions of Arkansas Supreme Court. The citations offered in the petition and brief announce the rule of construction prevailing both in the State Court and in the Circuit Court of Appeals to the effect that when there are conflicting provisions in a policy of insurance, the one most favorable to the assured will be adopted. This is the universal rule of construction of insurance policies, but the Court of Appeals did not refuse or fail to apply this rule of construction, but found that there was no conflict and found also that the additional provisions for accidental death did not make the contract one of life insurance.

The Court did not find any conflict between the express provisions of the policy fixing the terms and dates of expiration and the other provisions, which added a benefit for accidental death only under certain conditions. The opinion itself clearly expresses the holdings

of the Court with reference to term insurance. Counsel cite no case holding that a contract similar to the one involved in this case can be terminated only upon notice for failure to pay premiums, as in the case of life insurance contracts. The Court of Appeals found there was no ambiguity—found that there was no question about the right of respondent to terminate the policy at any premium paying period. There could be no question as the language is plain and explicit, and petitioner, acting as the assured's agent received twenty-nine quarterly receipts, each stating specifically the date the insurance terminated.

At page 24 of the brief petitioner re-argues the provisions of the policy which he claims converts the policy from one of term to lifetime insurance, but does not support his argument by any citation of authority from Arkansas or elsewhere. This holding is not in conflict with any authority and is supported by logic, reason and general principles of law and justice.

The Arkansas case of Burlington Insurance Company v. Threlkeld, 60 Ark. 539, is cited under this point in the argument in support of the statement that termination of the agency was not binding on the insured without notice. But as petitioner herself testified on April 1, 1934, she made her payment at Little Rock and had notice of the change of place of payment of premium and the termination of the agency of Mr. Hamilton; yet this is not the material point in this case, for whether she had notice, or not, could not in any wise affect the right of the respondent to terminate the policy at any premium pay-

ing period. Petitioner has failed to show any conflict with Arkansas decisions on this point.

IV

On page twenty-six of petitioner's brief under "Specification No. 4", which does not appear from the petition itself to be a reason relied upon for the issuance of the writ, counsel says that the testimony of the petitioner relating to the payment of the premium for the first year in advance is undisputed. This is in the face of the fact that the record shows that petitioner carefully preserved every receipt that was issued to her for the renewal premiums over a period of more than seven years, yet she did not have any written memoranda for the alleged payment of \$74.00. At no time during this seven year period was any objection made to the date fixed in the receipts for the termination of the policy. She was the one interested witness in this case. It is unconceivable that her testimony could be considered undisputed.

The Supreme Court of Arkansas in the case of Blankenship v. Modglin, 177 Ark. 388, 68 S.W. (2d) 531, stated:

"Blankenship relied upon his own testimony in the case to show that the mortgage indebtedness was not made. This Court is committed to the rule that the positive testimony of an interested party will not be treated as undisputed."

And Mrs. Lyon was the beneficiary under the policy and was the only witness in her behalf.

Counsel also says that by cross examination of this

witness and by eliciting the same information or amplifying it upon cross examination respondent waived its right to challenge the testimony. It is a strange rule that a party is bound by the testimony of a witness upon cross examination, and no cases are cited in support of it. However, the Court below in the majority opinion did not deal with this phase of the case, and there is no showing that the failure to do so is in conflict with any Arkansas law.

CONCLUSION

Petitioner has failed to show any reason to justify this Court in granting certiorari. The alleged conflict between Circuit Courts of Appeal is on matters of procedure, but in any event an examination of the record discloses adequate procedural steps taken by the respondent and the authorities cited by petitioner are inapplicable to this case.

Petitioner has not shown, by any authority, that a policy such as the one involved here is not term insurance. She has failed to show that the right to terminate the policy at any premium paying period was abrogated under any law or decision of Arkansas. She has failed to show that the policy did not expire before the death of the insured and has failed to show by any Arkansas decision that the testimony of the petitioner that \$74.00 was paid in advance is competent.

The citations of authority offered in the petition and brief are general propositions, usually applied by the

State and Federal Courts alike—where the facts warrant, but are inapplicable here. There is no conflict between the decisions of the Circuit Court of Appeals and the decisions of the Supreme Court of Arkansas.

The petition for certiorari should be denied, for petitioner has failed to show that there might be any different decision should certiorari be granted and the Arkansas law applied. If the case is remanded to the Court of Appeals that Court will find itself in the same situation that existed at the time the case was originally decided, and will have no other or different law to apply than was applied at that time.

Respectfully submitted,

THOMAS B. PRYOR,
Counsel for Respondent.

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1938.

MRS. ZILLAH LYON **Petitioner**

VS.

No. 189

MUTUAL BENEFIT HEALTH AND
ACCIDENT ASSOCIATION **Respondent**

STATEMENT, BRIEF AND ARGUMENT
FOR RESPONDENT

✓ **THOMAS B. PRYOR,**
Attorney for Respondent.

THOMAS B. PRYOR, Jr.,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1933.

MRS. ZILLAH LYON Petitioner

vs.

No. 189

MUTUAL BENEFIT HEALTH AND
ACCIDENT ASSOCIATION Respondent

STATEMENT OF THE CASE

William R. Lyon, deceased policyholder, died on the 19th day of July, 1934, by accidental means. The purely accident policy (for death benefits), which was introduced in evidence, was issued December 31, 1926, and the plaintiff appeared as beneficiary in said policy. A quarterly payment of \$16.00 was made on April 1, 1927, and quarterly thereafter up to and including April 1, 1934. Each premium receipt, although some were different in wording than others, stated the date for which the premium was due, as well as the date of receipt, and that it:

"does hereby continue in force the said policy from date hereof until twelve o'clock noon, standard time, July 1, 1927,"

at which time the next quarterly payment would be due, and so on, each receipt carrying the policy in force for the ensuing quarter. It is admitted that the premium due July 1st, 1934, was not paid. It will be noted from reading the complaint (R. 9), on which this case was tried in the trial Court, that the petitioner admitted that this

premium had not been paid but attempted to excuse herself on the ground that the insurance company had established a custom of accepting payments late. It is true that she did attempt to pay the premium by United States postal money order for \$16.00, dated July 6th, 1934, which was forwarded by her to the Little Rock office of the respondent and was returned by letter dated July 13th, 1934 addressed to the deceased policy holder, the letter to the policy holder in part providing:

"We regret that it will not be possible for us to accept this payment, as the Home Office did not send us an official receipt for you.

"We note that you are past the age of sixty years, but we are today writing our Home Office and asking if it will be possible to make an exception in your case, and allow you to continue keeping your policy in force with the Thirty Day Elimination Endorsement attached. Kindly advise if you would desire to keep your policy in force if our Home Office will attach a Thirty Day Elimination Endorsement.
* * * " (R. 28)

"This letter was mailed on July 13th, several days before the insured's death, which occurred on the 19th day of that month.

Sub-section "C" of the Additional Provisions of the policy provides in part:

"The acceptance of any premium on this policy shall be optional with the association."

The policy is clearly for term insurance, the identical policy having been passed upon numerous times by the Courts as such. The policy itself provides on its face that a premium would be due "April 1st, 1937" and that:

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"If any such dues be unpaid at the office of the Association in Omaha, Nebraska, this policy shall terminate on the date such payment is due."

It also specifically provides under Additional Provisions, Sub-section "D":

"The term of this policy begins at 12:00 o'clock noon, standard time, on date of issuance against accident and on the 31st day after date of issuance against disease, and ends at 12:00 o'clock noon of the date any renewal is due."

It is undisputed that a premium was due July 1st, 1934. It is undisputed that a premium was offered to be paid some time after July 6th, 1934, and that the company exercised its option to refuse the acceptance of same, as it had a right to do under the policy, by returning the premium offered before the loss occurred. Although the petitioner in the pleadings admits a failure to pay the July 1st premium and offers an excuse for said failure, an attempt was made in the trial court to prove by oral testimony that \$74.00 in cash was paid when the policy was taken out to a since deceased agent and that the company therefore had on deposit more than enough to take care of the July 1st premium, and that this since deceased agent told her at the time that there were no days of grace and that payment of a year's premiums in advance would take the place of grace. (R. 41).

It was contended by respondent in the trial Court and throughout in this case that, first, the policy specifically provided when it expired, (three months after its issuance), and that a quarterly payment was necessary to keep it in force for each quarter, second, that receipts

for the premium payments (R. 33-41) clearly disclosed the period of insurance paid for by each and every premium and the date the insurance coverage terminated after the payment of said premium. There were twenty-seven of these premium receipts introduced in evidence by the petitioner's own testimony. It was contended that she therefore was estopped and bound by the recitals in the premium receipts as well as the terms of the policy itself. Third, that oral testimony could not vary the terms of the insurance contract and of the written receipts.

BRIEF AND ARGUMENT

The last premium tendered and accepted was received at Little Rock, Arkansas, on March 30th, 1934 and reads in part as follows:

"Official receipt for premium due April 1st, 1934 * * * keeps your policy in continuous effect * * * until 12:00 o'clock noon, standard time, July 1st, 1934. * * *"
(R. 25).

Every receipt, and they were all quarterly receipts, beginning the first quarter after the policy was issued, stated plainly the period for which the premium was paid and the date on which the policy coverage expired, as does the premium receipt referred to above. The receipt was binding on the parties. The policy itself provides:

"The term of this policy begins at 12:00 o'clock noon, standard time, on the date of issuance against accident * * * and ends at 12:00 o'clock noon on the date any renewal is due."

and provided that a premium of \$16.00 was due on a specific date three months after date of issuance. Each receipt provided for the next renewal date, which was at the termination of the quarter for which the receipt itself was issued.

In the case of Gorman v. Fidelity & Casualty Company of New York, 55 Fed. (2d) 4, the Court held:

"Where it was determined that accident insurance policy expired on a specific date, no liability could arise thereafter under contract based on accident occurring subsequent to expiration date."

The Court in the opinion stated:

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"It would seem to be elementary that no liability could possibly be incurred under this or any other contract after it had expired. Liability, if any here, must be bottomed on contract and certainly no liability could arise for a contract unless said liability had its inception when that contract was in existence The contract expired and terminated February 1st, 1927—not for some purposes but for all purposes"

In the first appeal of that case this Court held:

"The provision in the policy to-wit, that 'At the expiration of the term for which this policy is issued, and at the expiration of any term for which it may be renewed, the company will, subject to all the provisions and limitations therein contained, renew the policy for a similar term in consideration of the premium for the renewed term.'"

Fidelity & Casualty Co. of New York vs. Gorman,
38 Fed. (2d) 590.

In that case the Court held that the Company had the right to refuse to renew the policy where the insured was at the time suffering from the effects of an accident, and there the policy provided:

"That the assured upon the date said renewal takes effect is in sound condition. . . ."

In the case at bar the policy unequivocally states:

"The acceptance of any premium on this policy shall be optional on the association."

It is undisputed in this case that the premium was refused and returned after it was due but prior to the death of the insured. The evidence discloses that on July 13th prior to the death of the insured, which occurred on July 19th, the insurance company by letter returned the premium offered, stating in that letter:

"We regret that it will not be possible for us to accept this payment, as the Home Office did not send us an official receipt for you." (R. 28).

There is no question from the record in this case but what the policy terminated on the first day of July, 1934; that on the first day of July, 1934, the company exercised its right to refuse the premium, not on the ground that it was tendered too late but on the ground that the defendant did not desire to continue the insurance in force, as it had a right to do under the contract between the parties.

In the case of *Craig v. Golden Rule Life Insurance Company*, 184 Ark. 48, 41 S.W. (2nd), 769, the Supreme Court of Arkansas in its opinion stated:

"The parties made their own contract, which is free from ambiguity and necessarily must be enforced according to its terms. The beneficiaries must stand in the shoes of the insured and will be bound by the terms of the policy issued; and the insured accepted and retained, without objection the policy until it was forfeited for non-payment of premiums upon the date fixed by its terms." (Citing cases).

It is contended by counsel for petitioner that because the insurance policy improved in death benefits (there was never any cash or loan value on the policy) the longer it had been in force, it was therefore not a term policy but became in fact assimilated to lifetime insurance, terminable like life insurance only upon notice for failure to pay premiums after full opportunity to pay had been given. It is argued that under these provisions an insured builds up an increasing interest of value in the policy and that it would be harsh to let him be deprived

of such increase at the option of the association.

The Circuit Court of Appeals in its opinion in this case stated:

"But we are not persuaded that the promise to make the additions to the accidental death benefits if the policy should be continued, change the nature of the insurance. It is observed that the increases in the amounts promised by the policy do not apply to the numerous other hazards covered but only to loss by accidental death, and it is not contended that the increase would cause the insurance to become unprofitable to the association or that there was any fraud in the transaction. The practice of including similar promises in accident insurance policies is not uncommon and we are not cited to any case which supports the contention that such increase of benefits works a change in the nature of the insurance."

It is to be noted that in the brief filed in this Court no cases are cited by counsel for petitioner to support his contention in this respect.

The parties in making that contract, like other contracts, had a right to provide for the terms and conditions of the contract, and in the absence of fraud are bound thereby. As stated in the case of *Prange v. International Life Ins. Co. of St. Louis*, 329 Mo. 651, 46 S.W. (2d) 534, the Court states:

" . . . he must have known that for the payment he was then making he was getting nothing more than term insurance for a term beginning on that date and ending April 4, 1923. . . . Courts are without authority to rewrite contracts, even insurance contracts, although it may appear that in some respects they operate harshly or inequitably as to one of the parties; they discharge their full duty when they ascertain and give effect to the intentions

of the parties, as disclosed by the contract which they have themselves made."

The Arkansas authorities so hold.

Home Mutual Benefit Association v. Mayfield,
142 Ark. 240; 218 S.W. 371;

Southern Surety Co. v. Penzel, 164 Ark. 365;
261 S.W. 920;

Mutual Benefit Society v. Harris, 178 Ark. 24;
9 S.W. (2nd) 773;

McDaniel v. Missouri State Life Ins. Co., 185 Ark.
1166; 51 S.W. (2nd) 981.

Certainly the policy holder in the case at bar must have known that for the payment he was then making, "April 1st premium" he was getting nothing more than term insurance for a term beginning on that date and ending July 1st, 1934. There were twenty-seven premium receipts introduced in evidence, each one stating the period of the insurance coverage. These premium receipts were issued by the respondent and accepted without protest by the insured. They were issued quarterly over a period of more than seven years. The parties to this insurance contract thereby construed the contract itself.

In the case of **Craig v. Golden Rule Life Ins. Co.,** 184 Ark. 48, 41 S.W. (2d) 769, *supra*, the Supreme Court of Arkansas again stated the recognized principle of law that:

"It is a well settled principle of law that in the interpretation or construction of the contract, the construction the parties themselves have placed on a contract is entitled to great weight and will generally be adopted by the courts in giving effect to its provisions. This is especially true in cases of ambiguity in the written contract." (Citing cases).

In the case of *Ripley v. Sage Land & Improvement Co.*, 138 Wis. 304, 119 N.W. 108, the Court held:

"One who accepts and retains for a long period, without objection, an account rendered, together with the balance shown to be due thereon, irrevocably assents to the account so that he cannot subsequently take steps to falsify it."

And so in the case at bar, where an account was stated every three months for seven years and three months, can the plaintiff now come into Court and say that they were both wrong all the time in the statement of their mutual rights and liabilities, particularly in view of the fact that she acted with and as the agent for the policy holder (R. 28) so far as transactions with the defendant were concerned, and where she comes into Court, filing two complaints, and never suggests that additional premiums were paid until after the law of this case was argued on demurrer and not then until the actual trial of the case had proceeded on its merits? Plaintiff should be estopped by her own actions.

It has many times been held that the identical policy here involved is strictly a term policy.

In the case of *Smith v. Mutual Benefit Health & Accident Ass'n.*, 10 F. Supp. 110, construing a provision of the insurance contract under consideration here, the Court stated after quoting this provision of the policy:

"The acceptance of any premium on this policy shall be optional with the Association, and should the premium provided for herein be insufficient to meet the requirements of this policy, the Association may call for the difference as required."

That:

"Clearly under the last-quoted paragraph the defendant company has a right to terminate this policy and to refuse to accept future premiums."

In that case the Court held that the Association could not terminate the policy so as to affect any existing claim. We wish to call the Court's special attention to the case of *Johnson v. Mutual Ben. Health & Accident Ass'n.*, 123 Cal. App. 41, 10 Pac. (2nd) 772, where a demurrer was sustained to the second amended complaint, where the facts alleged are almost identical with the facts set out in the first amended complaint in this case, and where the Court held:

"Under allegations of plaintiff's complaint, accident and health policy held not in force at insured's death because of non-payment of premium. * * * and the policy provided that it would terminate on day installment payment was due if not paid."

The Supreme Court of Oklahoma in the case of *Davis v. Mutual Benefit Health & Accident Ass'n.*, 168 Okla. 514, 34 Pac. (2d) 579, construing a policy identical with the policy sued on herein held:

"Accident policy; which by its terms expired at noon Sunday, held not to cover accident occurring Sunday afternoon, since fact that last day for payment of premium fell on nonbusiness day did not extend policy."

And the Court in its opinion continued:

"The insurance company specifically reserved the right of option to be exercised by it in the acceptance of any premium upon the policy. * * * The extension of an option under a benefit, health, and accident policy and the extension of coverage of insurance

under such a policy are not synonymous or convertible terms."

The Supreme Court of Arkansas in the case of *Matthews v. Continental Casualty Company*, 78 Ark. 81, 93 S.W. 55, says:

"The defendant insured Ivan L. Matthews against accident occurring 'within one year from twelve o'clock noon standard time of the date of the policy, which was the 11th day of December, 1902.' The accident to Matthews happened on the 11th day of December, 1903 at four o'clock and thirty minutes in the afternoon. Did the defendant insure Matthews against this accident? This is the only question in the case.

"The parties to the contract of insurance agreed and stipulated when the year should begin. They had the right to fix the time and did so. The contract was valid and must be enforced according to its terms. The accident did not occur within the year so fixed and plaintiff cannot recover."

In the case of *Yett v. Oregon Surety & Casualty Company*, 88 Or. 620, 172 Pac. 486, it was held:

"The acceptance for several months, by one insuring against accident from month to month by a policy requiring payment of premiums on the first of each month in advance, and reserving to the insurer the right to refuse to renew, of premiums after the premium day has passed, confers no right on the insured to a renewal by tender of premiums after the premium day has passed."

In the case of *Raynor v. National Cas. Co.*, 125 Misc. Rep. 174, 210 N. Y. Supp., 586, it was held:

"Accident policy by its terms extending to specified date and for such further time as may be stated in the renewal receipts and providing that premiums were payable on first of each month, in advance, constituted continuing offer by company to renew policy

whenever additional premium was paid, and on insured's failure to pay renewal premium in advance policy terminated, precluding recovery for insured's accidental death, thereafter and before tendering premium, notwithstanding insurer had previously accepted delayed premiums."

In the case of *Balch v. Fed. Life Ins. Co.*, 227 Pac. 826, 39 Idaho 304, it was held:

"A health and accident policy issued for three months, to terminate at noon on a definite date named therein, providing that it may be renewed for another three months on payment in advance of the premium for that length of time, but provides that it shall continue in force only so long as the further premium shall be paid in advance . . . terminates without notice at the expiration of time for which the premium is paid."

At the close of the evidence in this case the insurance company moved for an instructed verdict on the following grounds:

"That the policy terminated by its own terms on the first day of July, 1934, and that the defendant herein, as shown by the policy and as the evidence discloses, had the option to reject a premium payment and exercised that option; and on the further ground that the premium receipts, themselves, show that the policy terminated on the first day of July, 1934, prior to the time this loss occurred."

The Circuit Court of Appeals held that this motion should have been granted. Counsel for petitioner contends that oral testimony should be accepted as varying not only the terms of the policy but the terms of twenty-seven separate and distinct premium receipts. The rule is so well established that oral testimony may not vary the terms of a written contract that counsel feel that it is unnecessary to cite authority on this point. Counsel cite numer-

ous authorities in contending that testimony of an oral contract may vary the terms of a written contract if not objected to when offered in evidence. None of the authorities cited so hold. There are no authorities that permit an oral contract to vary the terms of a written contract simply because such oral contract is established in evidence. After citing these authorities, counsel cite numerous authorities on the proposition that:

"An admitted agent may be dealt with as a general agent in matters within the apparent scope of the agency, * * *"

which becomes unimportant unless the claimed oral contract is to be permitted to supersede the original written contract and the twenty-seven original premium receipts.

Under Specification of Error No. 3 argued by counsel for petitioner it is stated:

"The Court of Appeals held that the contract provides for insurance on the quarterly payment plan and therefore any change in the plan of payment would amount to a change and extension of the terms of the contract, and that the local treasurer was without authority to bind the company with such a change.

"It is obvious that in reaching that conclusion the Court failed to give due effect to the well-settled rule that requires a construction of the terms of the policy most liberally in favor of the insured, and that in case of conflict or ambiguity a construction will not be adopted that will defeat recovery if it is susceptible of a meaning that will permit one." (Petitioner's brief, page 20).

Could there be any ambiguity or misunderstanding on April 1st, 1934, when the last premium was paid and

accepted as to what period that premium payment covered and as to when insurance coverage terminated?

This premium receipt plainly states:

" * * * until twelve o'clock noon, standard time, July 1, 1934, at which time another premium will be due."

Apparently, from the contention made by counsel for petitioner, his client did not understand that the policy was continued in force by the payment of this particular premium to:

"twelve o'clock, noon, standard time, July 1st, 1934 * * * " (R. 25).

but that it was vague and indeterminate as to when the policy coverage would terminate. If this had been the only receipt that so provided it may have been contended by petitioner that it was overlooked, but as the record shows in this case, twenty-seven such receipts were issued and accepted without protest by the policy holder and the petitioner.

There could not be more explicit printed language than:

"until twelve o'clock noon, standard time,, July 1st, 1934."

It is contended by petitioner, however, that this receipt was incorrect, as were the twenty-seven others that were introduced in evidence and in truth and in fact the receipt did not mean what it said, but that the insurance was carried over and beyond "twelve o'clock noon, standard time, July 1st, 1934" and that there was at the time an

uncertainty as to what period the insurance coverage ran. Furthermore, after the first day of July, 1984, and before the death of the policyholder, the insurance company, by letter returned the quarterly premium payment that was tendered late, stating:

" * * * we regret that it will not be possible for us to accept this payment, * * * " (R. 28)

The policy plainly provides:

"The acceptance of any premium on this policy shall be optional with the association." (Additional Provisions, Paragraph "C").

It is undisputed that the premium was returned before the loss occurred. It is apparently contended by petitioner that the provision:

"The acceptance of any premium on this policy shall be optional with the association."

is meaningless and of no effect whatsoever. Certainly, if the insurance company had the right to refuse the premium and exercised that right within the time, it would not be held for any loss occurring subsequent thereto.

Under Specification of Error No. 5 (petitioner's brief 35) petitioner argues that the trial court did not err in directing a verdict for the petitioner. We feel that this Specification of Error is unimportant and that the issues in this case are determined by the explicit provisions of the insurance policy and the authorities above referred to. However, since the specification is argued at length, we desire to refer the Court to the case of Blankenship

v. Modglin, 177 Ark. 388, 68 S.W. (2nd) 531, where it was stated in the opinion:

“Blankenship relied upon his own testimony in the case to show that the mortgage indebtedness was not paid. This court is committed to the rule that the positive testimony of an interested party will not be treated as undisputed.” (Citing cases)

The only witness who testified in the case at bar was the petitioner, who certainly was an interested witness, and who testified regarding a contended transaction with a since deceased agent of the Association. Although, as the record shows in this case, petitioner carefully preserved the premium receipts paid after the delivery of the policy, yet no memorandum whatever was taken or other written evidence made of the contended payment of \$74.00 to this since deceased agent.

Furthermore, since petitioner did not move for a directed verdict, the mere fact that respondent did would not have the effect of withdrawing the case from the jury or conceding that the case should be taken from the jury.

65 C. J. 434.

Webber v. Rodgers, 128 Ark. 25, 93 S.W. 87.

Sigua Iron Co. v. Green, 88 Fed. 209.

CONCLUSION

The policy evidenced a contract of term insurance which association had a right to discontinue at any time when renewal was due. By its letter refusing a renewal receipt and returning the postal money order, it did terminate the policy. The proposal to enter into a differ-

ent contract was not acted upon. The term of insurance was ended prior to the accident.

The insured began making quarterly payments of \$16.00 immediately before the date, April 1st, 1937, and kept them up each quarter for years, and that is what the parties meant and intended should be done. Each receipt stated the expiration date of the insurance coverage.

As stated in the case of Craig v. Golden Rule Life Ins. Co., supra, by the Supreme Court of the State of Arkansas:

"It is a well settled principle of law that in the interpretation or construction of the contract, the construction the parties themselves have placed on a contract is entitled to great weight and will generally be adopted by the courts in giving effect to its provisions."

The parties over a period of more than seven years in writing stated and acknowledged that the insurance coverage expired at the end of each quarter. Can the courts now say that the last premium receipt extended the coverage beyond that period?

The respondent prays that the action of the Circuit Court of Appeals be affirmed.

Respectfully submitted,

SIGNED THOS. B. PRYOR

THOMAS B. PRYOR,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1938.

MRS. ZILIAH LYON **Petitioner**

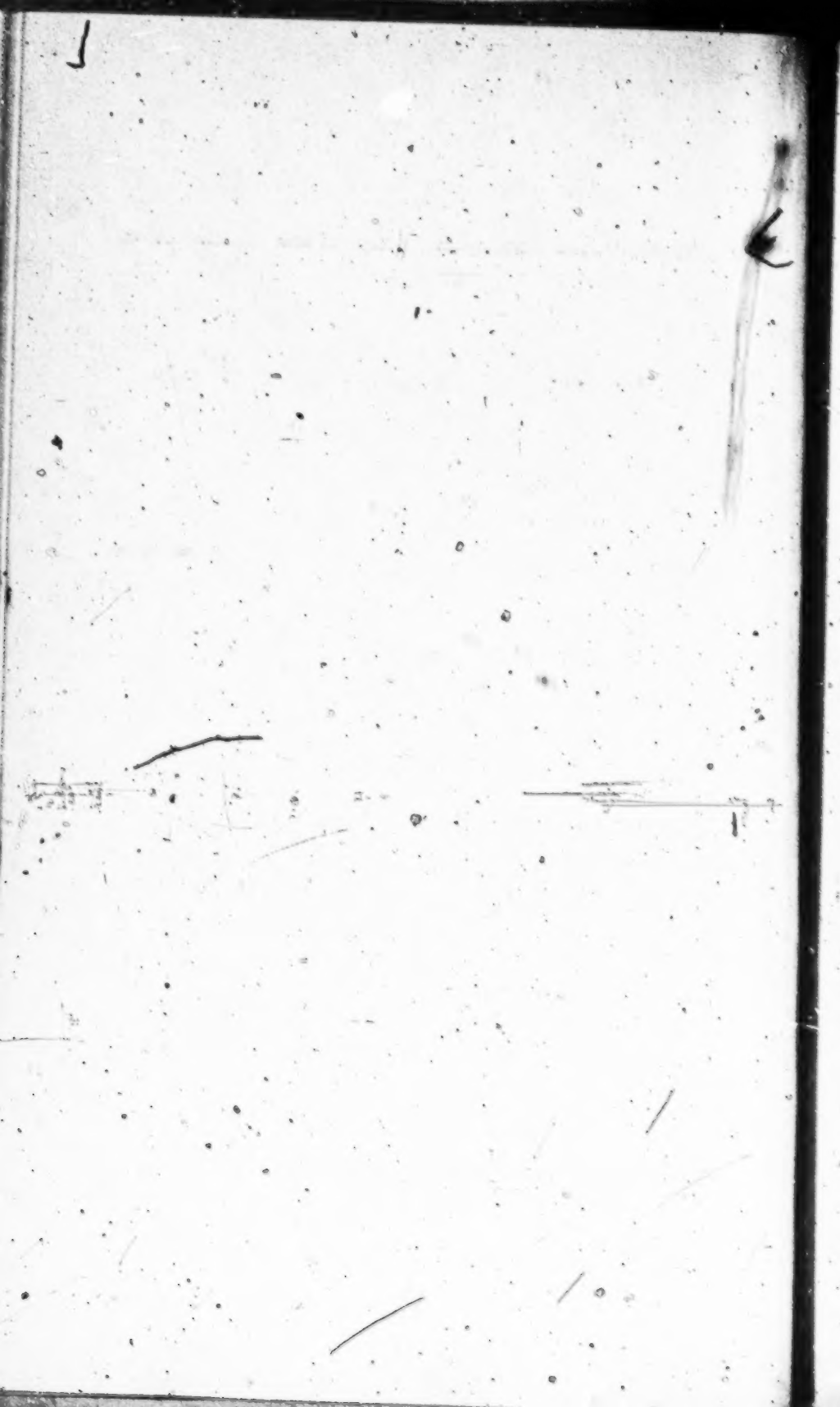
VS.

No. 189

MUTUAL BENEFIT HEALTH AND
ACCIDENT ASSOCIATION **Respondent**

PETITION FOR REHEARING

THOMAS B. PRYOR,
THOMAS B. PRYOR, Jr.,
Fort Smith, Arkansas,
Counsel for Petitioner.



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In the Supreme Court of the United States

OCTOBER TERM, 1938.

MRS. ZILIAH LYON _____ Petitioner

vs.

No. 189

MUTUAL BENEFIT HEALTH AND
ACCIDENT ASSOCIATION _____ Respondent

PETITION FOR REHEARING

Comes now the above named, Mutual Benefit Health and Accident Association, respondent, and presents this, its petition for rehearing of the above entitled cause and in support thereof respectfully shows:

I.

This Court has failed to give effect to all of the provisions of the policy of insurance and has consequently held that Sub-section "C" of the additional provisions of the policy (Record 22-C) is *prima facie* proof of the payment of Seventy-four Dollars (\$74.00) in advance for the first year and that the effect of the provisions is to extend the policy term a year beyond the date specified in the policy itself. When the whole of the Sub-section is read it means simply that the first year the policy is in force the total annual premium will amount to Seventy-four Dollars (\$74.00) and that subsequently the total annual premiums will amount to Sixty-four Dollars (\$64.00), and further means that the premiums may be paid upon a quarterly

has, beginning with Sixteen Dollars (\$16.00) on April 1st, 1927. It is a fundamental rule that all of the provisions of a contract must be read together and the meaning ascertained from the whole.

American Indemnity Co. v. Hood,

183 Ark. 266; 35 S.W. (2) 353.

We feel that upon application of this rule to the clause and policy in question here, the Court's decision would be that the clause has the meaning here contended.

II.

Even if this Court should find upon reconsideration that the clause mentioned above is ambiguous, which is the most that has been contended for it by counsel for petitioner, this case should be reversed and remanded to the District Court with instructions to submit to the jury the question of whether the Seventy-four Dollars (\$74.00) was actually paid by the petitioner. The constitution of the state of Arkansas and the constitution of the United States both provide for the right of a trial by jury. This defendant should not be deprived of that right unless there has been a waiver by some act of the respondent. The respondent, after petitioner had given her testimony to the effect that she had paid Seventy-four Dollars (\$74.00) in advance, asked the trial Court for a continuance, so as to enable it

"to make proof to the effect that \$74.00 was not paid or received by the Defendant at the time the policy was issued * * * ." (R. 44).

At the same time, counsel for the defendant called the Court's attention to the fact that it had no intimation

that it would even be claimed that \$74.00 was paid at the time this policy was issued, and offered to prove that no such claim had ever been made prior to the testimony of the plaintiff in this case. The Court overruled that motion. (R. 45).

We call this Court's attention to the complaint (R. 9) in which the plaintiff detailed facts to the effect that the policy lapsed and expired by its own terms prior to the death of the policyholder, and nowhere in the complaint is there any allegation that \$74.00 was paid at the time the policy was issued. It is further significant that in suing for a recovery under the terms of the policy, which would have permitted petitioner to recover all of the said \$74.00 premium if it had been actually and in fact paid, petitioner did not seek to recover any part of it.

In this complaint, after using some eight or nine hundred words in pleading an excuse for the failure to pay a premium due on July 1st, 1934, the petitioner pleaded:

"Third, that said premium had been previously paid and was therefore not due and payable on said 1st day of July and the insured was not liable for payment of same at said time."

This broad, general and indeterminate allegation was controlled by the specific allegations previously made in the complaint and was not notice to counsel for the defendant that such a claim would be made as developed in the testimony of Mrs. Lyon.

The trial court erroneously overruled respondent's motion for a continuance and forced the respondent to

— 4 —

proceed upon an issue not found in the complaint—an issue upon which counsel for respondent had no notice whatsoever. Respondent therefore could not offer any further evidence, though it did clearly show its desire to do so. Can it then be said that the respondent's motion for a directed verdict was a waiver of the right of trial by jury?

Furthermore, as the record shows in this case, respondent had no opportunity to offer further instructions, as the Court upon its own motion immediately instructed the jury to return a verdict (R. 45) and it will likewise be noted that exception was made to the action of the Court.

The case of A. B. Smith Lumber Company v. Portis Bros., 140 Ark. 356, 215 S.W. 590, cited by this Court, does not show that any objection was made to the submission of the case to the Court sitting as a jury, while the record clearly reflects in this case that objection was made. Of course, a failure to save an exception to the action of the Court would be an acquiescence in the action taken by the Court and would be a waiver, but, as shown by the record in this case, there was no acquiescence on the part of the respondent in the action of the Court, nor could there have been a waiver of the right of trial by jury.

In the case of Webber v. Rogers, 128 Ark. 25, 193 S.W. 87, the Court said:

"But so far as we are advised, no appellate court has held that the trial court may withdraw the submission of a case from the jury and decide con-

— I —

troverted questions of fact simply because one of the litigants requests the Court to direct a verdict in his favor. To so hold would either deny the right of trial by jury on the one hand or would prevent a litigant from asking a directed verdict on the other, and would tend to prevent litigants from ever submitting the question of the legal sufficiency of the evidence to the Court."

The cause was remanded by the Supreme Court of Arkansas, with directions to submit the case to the jury. This is a leading case in Arkansas upon this point and has been cited with approval many times, one of the last decisions being *Dunford v. Dardanelle & Russellville Railroad Company*, 171 Ark. 1036, 237 S.W. 170, decided seven years after the *Smith v. Portis* case, *supra*. In the case of *Dunford v. Dardanelle & Russellville Railroad Company*, the Court in its opinion stated:

"It is the settled practice in this state where both parties asks a directed verdict and neither asks any more instructions nor offers to produce further testimony, to treat the case as having been withdrawn from the jury * * *."

In this case respondent offered to produce further testimony, which the trial court would not permit.

In the case of *King v. Bank of Pangburn*, 150 Ark. 138, 233 S.W. 920, decided two years after the *Smith v. Portis* case, the Supreme Court of Arkansas said:

"It is true that both parties asked a peremptory instruction, but in addition thereto appellant asked other instructions, and the Court should not, therefore, have directed a verdict against him, if the testimony in his behalf, viewed in the light most favorable to him, would support a verdict in his favor." (Citing *Webber v. Rogers*, 128 Ark. 25).

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Even if this Court does find that the clause concerning payment of premiums is ambiguous and that the testimony of the petitioner may be heard in explanation of the contract, there are particular facts and circumstances in the record which would have clearly authorized a jury to find for the respondent, notwithstanding the fact that the trial court would not permit respondent to obtain evidence to contradict her testimony.

Petitioner carefully preserved her checks, her receipts, the policy, various and sundry letters and all other evidence concerning this policy that came to her hands, yet she did not have any kind of a receipt or memorandum for the first premium of \$74.00, which she says, for the first time at the trial of this case, that she paid. For seven years she accepted receipts stating definitely the date the policy terminated. No objection was ever made by her, and as pointed out in respondent's original brief, the testimony of an interested witness will not be considered as undisputed.

Blankenship v. Modglin, 177 Ark. 388,
65 S.W. (2d) 531.

Judge Stone, of the Eighth Circuit Court of Appeals, in his separate opinion in this case, says:

" . . . that plaintiff was entitled to the judgment of a jury on the verity of the explanation to which she testified."

Surely, the defendant is entitled to the judgment of a jury on the verity of this testimony.

In the case of National Equitiy Life Insurance Company v. Parker, 190 Ark. 642, 80 S.W. (2d) 630, the Su-

preme Court of Arkansas held that possession of the policy gives rise to a presumption that the premium was paid for the first term, but it also held in that case that the evidence of the insurance company overcame this presumption, and so in this case if the Court had permitted the respondent to obtain evidence upon the issue suddenly injected in this case it might well be that as a matter of law petitioner could not recover, but in any event, assuming an ambiguity in the policy, which counsel for respondent cannot see, the testimony of the plaintiff could do no more than make a question for a jury to decide, and as pointed out above, the right of a trial by jury was not waived and a definite exception was saved to the action of the Court in directing a verdict on its own motion.

In the case of National Equity Life Insurance Company v. Parker, supra, the clause there involved provided:

"and of the payment in advance of \$76.08, being the premium for one year's term insurance * * *."

and as stated; it was there held that possession of the policy raised a presumption of payment which could be rebutted and overcome and in that case was overcome as a matter of law. It will be noted that the clause there involved could not possibly be construed as ambiguous, yet was not treated as being conclusive, as this Court has treated the clause here involved.

We respectfully submit that even if this Court should hold that the language of the policy was such as to permit the testimony offered in this case, the cause

— 8 —

should be reversed, with instructions to submit the issue of fact as to whether the premiums were actually paid to a jury.

For the foregoing reasons, respondent respectfully urges that this petition for rehearing be granted and that the judgment of the Circuit Court of Appeals be upon further consideration affirmed, or at least that the case be reversed and remanded to the trial court for: .

“ . . . the judgment of the jury on the verity of the explanation”

of the petitioner.

Respectfully submitted,

.....
Counsel for Respondent.

CERTIFICATE OF COUNSEL

I, Thomas B. Pryor, Jr., counsel for the above named respondent, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

Counsel for Respondent.
.....

SUPREME COURT OF THE UNITED STATES.

No. 189.—OCTOBER TERM, 1938.

| | |
|--|--|
| Mrs. Zillah Lyon, Petitioner, vs. Mutual Benefit Health and Accident Association. | } On Writ of Certiorari to the United States Cir- cuit Court of Appeals for the Eighth Circuit. |
|--|--|

[January 3, 1939.]

Mr. Justice BLACK delivered the opinion of the Court.

Petitioner, (plaintiff below) brought suit as beneficiary in the District Court against respondent (defendant below) on a health and accident policy issued by respondent in 1926 to petitioner's husband. Plaintiff alleged that the insured was accidentally killed July 26, 1934, while the policy was in full force and effect insuring against death resulting from accidental causes. At the conclusion of plaintiff's evidence, defendant declined to offer any evidence and did no more than move for a peremptory instruction. Defendant's motion was based upon the contentions that (1) the policy was not in effect when insured was killed because defendant had exercised an option granted it by the policy to reject the quarterly premium due July 1, 1934; (2) that the "premium receipts themselves show that the policy terminated on the first day of July, 1934, prior to the time this loss occurred." Defendant's motion for peremptory instruction was denied, defendant excepted, and the court directed the jury to return a verdict for plaintiff. Defendant's exception was noted, the jury rendered verdict for plaintiff, and the court entered judgment upon the verdict.

The Court of Appeals reversed,¹ holding that the policy was term insurance and reserved to defendant the right to reject any quarterly premium on the due date, that defendant had properly exercised its option in rejecting the quarterly premium due July 1, 1934, and that the policy was, therefore, terminated prior to insured's death. The court further held that no competent evidence

¹95 Fed. (2d) 528.

had sustained plaintiff's allegations that the required premiums had been paid. We granted certiorari.²

In the view we take of the case, it is unnecessary to consider plaintiff's contention that the Court of Appeals erred in holding that defendant had the option to cancel the policy upon the due date of any quarterly premium. We find that there was competent and substantial evidence to sustain plaintiff's allegation that insured had paid premiums sufficient to keep the policy in effect up to and including the date of insured's death.

The evidence showed that:

The policy sued on was issued December 31, 1926; after advance payment of \$74.00 for the first year's premium, the policy was delivered to insured; thereafter, all quarterly premiums were paid to the defendant's local treasurer located at Rogers, Arkansas (where the policy was sold and delivered) up to and including the quarterly premium due January 1, 1934; these premiums were usually paid in advance, but not always; before April 1, 1934, plaintiff as agent for the insured went to the office of the local treasurer at whose office she had paid all the other premiums; he could not be found at the office; a young girl in the office suggested that the payment be sent to Little Rock; plaintiff mailed that payment to Little Rock and received a receipt dated March 30, 1934; plaintiff had not then received, and never did receive any notice from the company that it had moved its office or changed its method of collecting premiums; July 1, 1934, when the next premium was due she went to the local treasurer's office and found it closed; diligent search for him disclosed that not only had his office been closed, but he had moved from the house in which he had formerly resided; continuing to search for the treasurer, she finally found him several days later early in the morning entering a car in front of his office; he declined to accept the premium, told her to send it to Little Rock and informed her that she should have received a notice from the company to that effect; that day, July 6, she bought a money order, "addressed the envelope just to the company at Little Rock" and mailed it; July 13, the Little Rock office of the company wrote her that it could not accept the payment because the Omaha home office had not sent an official receipt for this policy payment; in that letter and in a subsequent communication of July 26, the Little Rock office offered to reinstate the policy but with restricted benefits; on July 26, however, the insured was killed by accidental means within the terms of the policy. The defendant offered no evidence whatsoever.

First. The policy provides as to premium payments that "this policy is issued in consideration of . . . the payment in

²— U. S. —, cf. *Bahlin v. New York Life Ins. Co.*, 304 U. S. 202, 206.

advance of \$74.00 the first year, and the payment in advance of . . . \$16.00-dollars quarterly thereafter, beginning with April 1, 1927, is required to keep this policy in continuous effect." This language is clear and nothing elsewhere in the policy alters its meaning. True, the printed application signed by deceased, December 27, 1926, and upon which the policy was issued four days later, contains the printed question, "What is the premium?" and a type-written answer, "\$16.00 quarterly." However, this is not inconsistent with the provision of the policy for the payment of \$74.00 in advance and \$16.00 quarterly premiums. The provision for payment in advance of \$74.00 the first year required payment before the date the policy took effect, which according to the policy was the date of issue. Under the language of this provision actual payment of a year's premium in advance purchased insurance for a year. The dates for further payments to extend the policy beyond a year could be and were fixed by the policy contract. Payment for the first year carried the policy to December 31, 1927, and the first quarterly payment, due by the policy's terms April 1, 1927 and paid in advance of that date, extended the policy another quarter beyond December 31, 1927. Each succeeding quarterly payment carried the policy a corresponding three months. The questions before the trial court were whether the \$74.00 first payment was actually made, and whether thereafter quarterly payments were made in an amount sufficient to carry the policy from the end of the first year up to and including the quarterly period in which death of insured occurred.

Since the policy recites that "this policy is issued in consideration of . . . the payment in advance of \$74.00 the first year . . ." delivery of the policy prima facie established the fact of the advance payment of that amount.⁵ This evidence was reinforced by plaintiff's testimony that the \$74.00 was so paid. Defendant made no objection to this testimony. On cross-examination by defendant, plaintiff amplified her testimony as to why she paid the quarterly premium in April, 1927, after having already paid the premium for a whole year before the policy was delivered. She explained that this was because defendant's representative told her and the insured that "there were no days of grace included in

⁵ Washington Fid. Nat. Ins. Co. v. Anderson, 187 Ark. 974, 976; National Equity Life Ins. Co. v. Parker, 190 Ark. 642, 644; cf. Splawn v. Martin, 17 Ark. 146, 153.

in the policy, but if we paid a year's premium in advance that would take the place of these days of grace."

Although defendant did not object to plaintiff's testimony of payment, and evoked explanation of it on cross-examination, the Court of Appeals, without any reference to governing State law, concluded that the evidence was incompetent. That court believed this evidence represented an effort to alter the terms of the written policy contract by an oral agreement violating the provisions that "This policy . . . contains the entire contract of insurance," and "No agent has authority to change this policy or to waive any of its provisions." But this evidence of payment of premiums as required by the policy, did not affect the terms of the written contract. It was offered to prove the discharge of the insured's obligation under the contract. The evidence was material to establish the fact of payment. No statutes of Arkansas or decisions of the highest court of that State⁴ have been pointed out which would make such relevant evidence incompetent.⁵ The \$74.00 payment for the first year, together with quarterly payments undisputedly made through April 1, 1934, carried the policy to January 1, 1935. We, therefore, find it unnecessary to consider whether the six days delay in paying the July 1, 1934 premium was excused by reason of attendant circumstances.

Second. The Conformity Act requires that "The practice, pleadings, and forms and modes of proceeding in civil causes . . . in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding."⁶

Our attention has not been directed to any more authoritative Arkansas ruling governing the procedural effect of a request for a peremptory instruction without more, than the decision of the

⁴ See 28 U. S. C., Sec. 724.

Cf. *D'Wolf v. Raband et al.*, 1 Pet. 476, 502; *Wilcox et al. v. Hunt et al.*, 13 Pet. 378, 379; *Nashua Savings Bank v. Anglo-American Co.*, 180 U. S. 221, 225; cf. *Erie R. Co. v. Tompkins*, 304 U. S. 64.

⁵ Cf. *Erie R. Co. v. Tompkins*, *supra*.

⁶ Cf. *Splawn v. Martin*, *supra*; *Vaquina et al. v. Taylor et al.*, 18 Ark. 65, 79; *Borden et al. v. Peay, Receiver*, 20 Ark. 293, 306; *Hill v. First Nat. Bank of Malvern*, 129 Ark. 365, 369; *Lay, Administrator v. Galles*, 130 Ark. 167, 170.

⁷ 28 U. S. C., Sec. 724.

Supreme Court of Arkansas in *A. B. Smith Lumber Co. v. Portis Bros.*, 140 Ark. 356. There the Court said (at 358, 359, 360): "The cause . . . proceeded to a hearing upon the pleadings and evidence. When the evidence was concluded, appellant requested a peremptory instruction, and no other. The court refused the instruction over the objection of appellant, and, on its own motion, instructed the jury to return a verdict in favor of appellees . . . over the objection and exception of appellant. . . . and the court, on its own motion, gave a peremptory instruction for appellee. The request for a peremptory instruction by appellant and the giving of the peremptory instruction by the court for the adverse party was tantamount to submitting the case to the court sitting as a jury; and the court's finding became a verdict as much so as if it had been rendered by a jury upon the issues and evidence. . . . So the question presented by this record is not whether there was sufficient evidence in the record to warrant the court in sending the case to the jury upon the issue of whether or not the undertaking was collateral, but the question is, Was there any legal evidence to support the finding of the court that the undertaking was original?"

This rule of procedure closely approaches that frequently approved by this Court on the same subject, to the effect that "'Where both parties request a peremptory instruction and do nothing more they thereby assume the facts to be undisputed and, in effect, submit to the trial judge the determination of the inferences proper to be drawn therefrom'. And upon review, a finding of fact by the trial court under such circumstances must stand if the record discloses substantial evidence to support it.'"

Here, there was ample evidence upon which to justify the verdict. Defendant obviously proceeded—after the evidence was closed—upon the belief that the facts and all the inferences to be drawn therefrom raised only a question of law for the court—not one of fact for the jury; and plaintiff acquiesced. Neither defendant nor plaintiff did anything to indicate a desire or belief that the jury should pass upon any facts. Thus, the District Court sitting in Arkansas, having jurisdiction only by reason of diversity of citizenship and trying a suit involving an Arkansas contract, followed the procedural rule announced by the highest court of that State.

* *Williams v. Vreeland*, 250 U. S. 295, 296; *Aetna Ins. Co. v. Kennedy*, 301 U. S. 329, 333.

While litigants in Federal courts cannot—by rules of procedure—be deprived of fundamental rights guaranteed by the Constitution and laws of the United States, the local Arkansas rule followed by the District Court does not result in such deprivation. In effect, that local rule is practically identical with the Federal rule which treats a request by both parties for peremptory instructions without more as a submission of issues of fact to the court. It is essential that the right to trial by jury be scrupulously safeguarded, and a State rule of procedure entrenching upon this right would not require observance by Federal courts.⁹ However, this Arkansas procedural rule—so closely approximating the Federal rule—does not amount to a prohibited invasion of Federal rights. Since the District Court followed the Arkansas procedural rule, and the verdict and judgment were supported by competent and substantial evidence, it follows that the Court of Appeals erroneously reversed the District Court's judgment. The judgment of the Court of Appeals is, therefore, reversed and that of the District Court is affirmed.

Mr. Justice ROBERTS did not participate in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

⁹ Cf. *Davis v. Wechsler*, 263 U. S. 22.

SUPREME COURT OF THE UNITED STATES.

No. 189.—OCTOBER TERM, 1938.

Mrs. Zillah Lyon, Petitioner,
vs.
Mutual Benefit Health and Accident
Association.

On Writ of Certiorari to
the United States Cir-
cuit Court of Appeals
for the Eighth Circuit.

[January 3, 1939.]

Mr. Justice BUTLER.

Mr. Justice McREYNOLDS and I are unable to accept the opinion or to agree with the judgment of the court just announced.

We are of opinion that the judgment of the circuit court of appeals should be reversed, and that, for the reasons given in the separate opinion of Circuit Judge Stone, 95 F. 2d 528, 534, the case should be remanded to the district court for proceedings in accordance with that opinion.

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